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No. 1

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

KESTUTIS EIDUKONIS,
Respondent,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Petitioner.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an employee's right to a military leave of absence for service in the reserve is forfeited under "a reasonableness standard" where a reservist admits that his motivation for taking eight months of military leave was to "play poker" with his employer and, therefore, bring his work-related problems to a head?

2. Whether an employee acted "reasonably" towards his employer when the employee provides seven days notice of an additional one and one-half months of military leave, immediately following over six and one-half months of leave, if the employee knew of the additional military leave months prior to notifying the employer and the employee admits to concealing this information from his employer?

3. Can the Third Circuit's thirteen point totality of the circumstance test of "reasonableness" provide guidance to employers and reservists, where that test of "reasonableness" allows a District Court to add factors not previously set forth by the Third Circuit as relevant, and which factors are inherently weighted against any employer?

4. Whether eight months of military leave spread across five separate and consecutive requests for leave is "per se unreasonable" when the military leave that was taken was not to acquire new skills, is taken in peace time, occurs during the employer's busiest season with unprecedented burden to the employer, and the reservist's motivation for taking the leave is to punish the employer for failing to promote him?

5. Assuming a reasonableness test applies to an employee's request to take leave from his employment, what is the proper standard for determining "reasonableness" given the split in the Circuits?

6. Does the Act permit unlimited leaves of absence for military service no matter what duty is involved?

PARTIES TO THE PROCEEDING

The parties in the Court of Appeals were Petitioner, Southeastern Pennsylvania Transportation Authority (hereinafter "SEPTA"), a statutorily-created mass-transit authority in the Commonwealth of Pennsylvania. The Respondent is Kestutis Eidukonis (hereinafter "Eidukonis"), who held a management position at SEPTA and who is an Individual Ready Reservist.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Authorities	iv
Opinion Below	2
Jurisdiction	2
Statutory Provision Involved	2
Statement of the Case	3
Reasons for Granting the Writ	18
Conclusion	28

Appendix

Appendix A

Opinion of District Court in Eidukonis I	A-1
--	-----

Appendix B

Third Circuit Court of Appeals Opinion	A-12
--	------

Appendix C

Opinion of the District Court (after remand)	A-38
--	------

Appendix D

Judgment Order	A-52
----------------------	------

Appendix E

Order Denying the Rehearing	A-54
-----------------------------------	------

TABLE OF AUTHORITIES

Cases:	Page
<i>Boyle v. Burke, et al.</i> , '925 F.2d 497 (1st Cir. 1991).....	19
<i>Eidukonis v. Southeastern Pennsylvania Transportation Authority</i> , 873 F.2d 688 (3rd Cir. 1989).....	2, 21
<i>Eidukonis v. Southeastern Pennsylvania Transportation Authority</i> , 757 F.Supp. 634 (E.D.Pa. 1991).....	2, 16
<i>Gulf States Paper Corp. v. Ingram</i> , 811 F.2d 1464 (11th Cir. 1987)	21
<i>Kolkhorst v. Tilghman</i> , 897 F.2d 1282 (4th Cir. 1990).....	18
<i>Lee v. City of Pennsacola</i> , 634 F.2d 886 (5th Cir. 1981).....	20
<i>Monroe v. Standard Oil Co.</i> , 452 U.S. 549 (1981)..	23
<i>Sawyer v. Swift & Co.</i> , 836 F.2d 1257 (10th Cir. 1988).....	26
<i>William "Sky" King v. St. Vincent's Hospital</i> , No. 90-889.....	18
<i>William "Sky" King v. St. Vincent's Hospital</i> , 902 F.2d 1068 (11th Cir. 1990)	18
Statutes:	
10 U.S.C. §267(a)	3
10 U.S.C. §268(a)	3
10 U.S.C. §270(a)	3
10 U.S.C. §673(b)	22
28 U.S.C. §1254(1)	2
38 U.S.C. §2021-2026.....	14
38 U.S.C. §2024(d)	2

TABLE OF AUTHORITIES — (*Continued*)

<i>Regulations:</i>	Page
Army Regulation 135200	3

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PETITION FOR WRIT OF CERTIORARI

The Petitioner Southeastern Pennsylvania Transportation Authority respectfully prays that a writ of certiorari issue to review the Judgment Order affirming the District Court Opinion by the United States Court of Appeals for the Third Circuit on November 12, 1991.

OPINION BELOW

The first District Court Opinion was unreported. (Pet. App., p. 1a). The matter was appealed, heard in the Third Circuit and remanded to the District Court (hereinafter referred to as Eidukonis I). That opinion is reported at 873 F.2d 688 (3d Cir. 1989) (pet. App., p. 16a). The second decision of the District Court again found in favor of the reservist (hereinafter referred to as Eidukonis II). That opinion is reported at 757 F.Supp. 634 (E.D.Pa. 1991). (Pet. App. p. 29a). The second District Court opinion was appealed to the Third Circuit. The Third Circuit affirmed the Second District Court Judgment, without opinion, pursuant to a Judgment Order. (Pet. App. p. 37a).

JURISDICTION

The judgment of the Court of Appeals was entered on August 12, 1991. A Petition for a Rehearing en banc was denied on September 30, 1991. (Pet. App. p. 39a). A stay of mandate was denied on September 30, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISION INVOLVED

38 U.S.C. §2024(d) of the Veterans' Reemployment Rights Act provides, in pertinent part:

Any employee not covered by [section 2024(c)] who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee

would have had if such employee had not been absent for such purposes.

STATEMENT OF THE CASE

SEPTA hired Eidukonis as a Production Control Specialist in the Rail Equipment Department effective on April 20, 1981. Eidukonis was a member of the Army Individual Ready Reserves.¹ An Individual Ready Reservist is not assigned to a particular unit. He belongs to the Army Reserve Personnel Center. In the event of mobilization, he could report to any unit designated by the Army Reserve Personnel Center. A Personnel Management Officer (PMO) is the primary focal point for the Individual Ready-reserve Officer. The PMO is the record custodian for that officer. A PMO assists an officer in getting orders for mandatory military training schools, advanced courses, training orders and assignments to individual mobilization units. An Individual Ready Reservist must serve on active duty training for not less than 14 days (exclusive of travel time). 10 U.S.C. 270(a).

Army Regulation 135200 sets parameters for active duty for training and special active duty for training that an officer can perform in one year. A tour for special active duty is funded by military headquarters. Special active duty cannot be utilized to fill an active Army staff position because it is short-staffed. The service must be reserve-related. An individual's special active duty cannot exceed 179 days in a fiscal year. In the event that the special active duty exceeds 179 days, then it will be counted against the Army's total strength.

1. There are in each armed force a Ready Reserve, a Standby Reserve and a Retired Reserve. Each reserve shall be placed in one of these categories. 10 U.S.C. §267(a). The Ready Reserves consist of units or reserves both liable for active duty as provided in Sections 672 and 673 of this title. The authorized strength of the Ready Reserve is 2,900,000. 10 U.S.C. §268(a).

An individual ready reservist must accumulate fifty (50) points for a retirement year. The last eight years must be fifty (50) points per year in order to qualify for a government pension. Any points accumulated beyond fifty (50) points in any year increases the pension computation. An Individual Ready Reservist would receive special active duty training by calling his PMO and seeking a tour of duty. In addition, a PMO can contact a reservist to discuss the acceptance of a tour. A tour for special active duty training is voluntary and rejection will not effect a reservist's career or pension.

After being on SEPTA's payroll for one week, Eidukonis left SEPTA for five months of military leave beginning on April 27, 1981, and continuing to September 28, 1981. In 1982, Eidukonis again took five months of military leave. He was on military leave from April 21, 1982, to September 13, 1982. In 1983, Eidukonis took three separate military leaves, cumulatively totalling three months of absence from SEPTA; the leaves all were in the period between June 10, 1983, to October 31, 1983.

At no time did Eidukonis qualify for another specialty while on any of his military leaves. All of the prior extended leaves occurred before the budgetary cycle (September - April) or took up no more than two of the eight month budget period. None of these prior leaves spanned the department's entire budgetary cycle nor in any other year was Eidukonis' department laboring under a two-fold increase in its workload as discussed, *infra*, which occurred from September, 1984 through April, 1985.

In the fall of 1983, Olin Boyd became Eidukonis' supervisor. Boyd's job title was Production Control Supervisor and he was responsible for all administrative activities for the Rail Equipment Department's Surface Rail Division. A staff of eight people reported to him, including Eidukonis. At the time Boyd became the Production Control Supervisor, he was responsible for an operating budget of seven million dollars.

Eidukonis voiced numerous complaints and criticisms about Boyd's abilities and admitted to feelings of disrespect and antipathy toward Boyd. Eidukonis' problems with Boyd largely concerned the work performance evaluations that Boyd gave him. Eidukonis applied for transfers and promotions out of Boyd's department during the period of March, 1984, to July, 1984, but none were granted. Eidukonis, however, admitted that Boyd had nothing to do with his not receiving a promotion. In fact, despite Eidukonis' dissatisfaction with his supervision, Boyd granted Eidukonis more military leave than any other supervisor at SEPTA whom Eidukonis worked under.

In May of 1984, Eidukonis discussed his two-week annual training with Boyd. The annual training was planned for the period of August 13, 1984, through August 25, 1984. Eidukonis assured Boyd that he would not be taking additional time for military training in 1984. The assurance was given because Eidukonis knew that his department was heavily burdened because of a location move scheduled prior to the department's busiest period — September through March of each year. The move of Eidukonis' department occurred on June 21, 1984. The entire department was moved from Second and Wyoming Streets to the Woodland Shop, a new facility that spanned more than a square city block.

Although Boyd's department had a two-fold increase in its workload, which was exacerbated by the move to Woodland and the assumption of many new responsibilities, Boyd was unable to hire additional staff to take up the burdens. Eidukonis was aware of his department's increased workload and knew of the unusual and extraordinary burdens placed on the department before he began his two-week training on August 3, 1984. Boyd testified that in each fiscal year, the period of September through March is devoted to budget preparation and is the busiest time for the department. The budget preparation period requires intensive hours and 90% of all

overtime is spent in that seven-month period. Moreover, during the period of mid-February through April, the department was required to conduct an inventory of the store rooms. Eidukonis was aware of the workload burdens and overtime that the budget cycle entailed because he had worked on the budget in prior years.

During his last day of summer military leave, Eidukonis telephoned Boyd and requested a one-week vacation to begin immediately after the conclusion of his military leave. Eidukonis promised to return to SEPTA after his one-week vacation. The summer, two-week annual tour of duty concluded on August 27, 1984. Boyd granted the one-week vacation after being assured by Eidukonis that he would return to work at the conclusion of his vacation on September 4, 1984. However, when Eidukonis requested the vacation and made the promise to return, he did not inform Boyd that he had already made himself available for a 26-day tour of duty scheduled to begin on September 5, 1984, continuing to October 1, 1984. The "Military Personnel Jacket" for Eidukonis reveals that as early as August 8, 1984, a Request For Orders (RFO) concerning Eidukonis had been submitted for the September 5, 1984, 26 day tour of duty. The RFO will not be issued unless the reservist indicates his availability for that tour of duty and the Army base has accepted the reservist.

Orders were issued and sent to Eidukonis at his home for the September tour of duty on August 15, 1984. Boyd was not informed until August 31, 1984, about the orders for the 26-day tour of duty beginning on September 5, 1984. Eidukonis returned to SEPTA from his vacation on September 4, 1984. On that day, he filed a Civil Rights Complaint with SEPTA's Office of Civil Rights claiming that he was denied a promotion to the Automotive Equipment Maintenance Department (AEM) because of the military leaves that he had taken.

On September 5, 1984, Eidukonis went out on military duty for another 26 days at Fort Indiantown Gap, Pennsylvania. Eidukonis again promised Boyd that he would return to SEPTA at the conclusion of the 26-day, September military tour of duty. However, on September 28, 1984, three days before his expected return to SEPTA, Eidukonis telephoned Boyd and advised him that he was taking a 140-day tour of duty. Eidukonis had accepted a tour of duty at Fort Indiantown Gap which was close to his home in Stroudsburg, Pennsylvania.

Boyd granted the request for the 140-day tour of duty because he did not know whether he could deny a request for military leave. After granting the request for the 140-day military leave, Boyd contacted SEPTA's Human Resources Department in an effort to get advice and assistance. Boyd testified that he sought the assistance of the Human Resources Department because Eidukonis breached his promise that he would only take two weeks of military leave in 1984, breached his promise that he would return to work after his one-week vacation and, similarly, breached his promise that he would return to work after the 26-day tour of duty in September, 1984.

Eidukonis took a 140-day leave during what he knew was his department's busiest period and the department's workload had doubled. Boyd was at a loss because he did not know "how to get this man back to work". Boyd testified to the difficulties in getting the department's work done during Eidukonis' absences for military duty. First, Boyd was required to reschedule and postpone assignments. Second, two other resource controllers were required to "double up" on the work that they were doing. Third, Boyd was required to use lower level, non-management union employees as "back-fill" to fill in for Eidukonis.

Boyd testified that it was inefficient to use lower level union employees to fill in for Eidukonis, who, along with the other two resource controllers, was the highest

level management employee in the department. Specifically, "back-fill" employees did not have requisition signing authority and they were restricted in the type of information that management could disclose to them because they were union employees. Boyd explained that the budget process involved management's review of wages, hours and contracts which were subjects that hourly employees could not be exposed to. Moreover, back-fill employees were limited in the amount of time they could be used because they were only part-time and served at the discretion of the superintendent. As an example of the problems presented by Eidukonis' absence, Boyd described how he was required to utilize a pregnant woman who knew nothing about trolley cars. Furthermore, management was concerned that the pregnant woman might injure herself on the shop floor. Eidukonis was fully aware of the problems occasioned through the use of back-fill employees since he had worked with back-fill employees.

In October of 1984, while still on his 140-day tour, Eidukonis planned a two-week annual training tour of duty at Fort Monroe which was to begin on March 18, 1985, and continue to March 30, 1985. The orders for this tour of duty were issued on November 23, 1984, and sent to Eidukonis' home in Stroudsburg, Pennsylvania. Eidukonis admitted that he scheduled in October, 1984, the March tour of duty at his convenience and without consulting Boyd or anyone else at SEPTA. Eidukonis admitted that he received the orders in November, 1984. Eidukonis also admitted that the two-week annual training tour need not have been taken in March and could have been scheduled any time in the fiscal year of 1985.

Major Wilson, one of Eidukonis' PMOs, testified that the two-week annual training tour that was to begin on March 18, 1985, was arranged directly between Eidukonis and Fort Monroe and that the issuance of the orders was a mere formality. Consequently, this tour of duty was a certainty in October, 1984, and the formal orders were received by Eidukonis in November; yet,

SEPTA was not informed about this tour of duty until February 8, 1985, seven days before his planned return to work.

After he had arranged the two-week tour of duty for March, 1985, Eidukonis had a telephone conversation with Mr. Robert Wert, Deputy General Manager of SEPTA. The conversation took place in late October, 1984, and Wert, on behalf of SEPTA, raised concerns about Eidukonis' extended military leaves. Despite Wert's statements to Eidukonis that he was concerned about Eidukonis' extended military leave, Eidukonis failed to inform Wert of the upcoming March 18, 1985, tour of duty. Eidukonis admitted that Wert informed him that he was "abusing" SEPTA by taking extended leaves. Several days earlier, Wert spoke to Major James B. Doyle who was on staff at Fort Indiantown Gap wherein again Wert raised SEPTA's concerns over the frequency and duration of Major Eidukonis' military absences from SEPTA. Major Doyle wrote a memorandum that summarized his conversation with Wert. This memorandum was copied to Eidukonis and Lt. Colonel Berich., the Reserve Component Advisor for Fort Indiantown Gap who was responsible for arranging and scheduling the reserve personnel.

On October 29, 1984, Eidukonis appeared at the SEPTA Woodland Shop in full military uniform and advised Boyd that he was packing up his apartment in Philadelphia to save money while on extended military leave. Furthermore, Eidukonis told Boyd that SEPTA's "AEM department was screwing him with his promotion". Eidukonis stated he would continue to take leaves away from SEPTA because AEM denied him a promotion. Eidukonis made no specific mention of dates, times or the durations of any future military leaves, nor did Eidukonis tell Boyd on October 29, 1984, that he had arranged the two-week tour of duty for March, 1985. Boyd wrote a memorandum memorializing his October 29, 1984, conversation with Eidukonis. Significantly,

the memorandum is a contemporaneous statement regarding the bad faith motivation of Eidukonis continuing to take leave from SEPTA and corroborates Eidukonis' admission that he failed to inform Boyd of the two-week annual tour of duty for March, 1985, which had been scheduled in October, 1984.

After Eidukonis' conversation with Boyd, SEPTA again inquired into the status of Eidukonis' military leave and about his return date to work. On November 15, 1984, Major Stout, Eidukonis' commanding officer, received a call from SEPTA's in-house counsel, Mr. Walsh, regarding Eidukonis' extended military leaves. Major Stout referred Walsh's call to Major Olgin who was on the staff of the adjunct's office. On November 20, 1984, Walsh wrote a letter to Major Doyle concerning Eidukonis' military leaves from SEPTA. The thrust of the letter was to determine whether Eidukonis was on legitimate military leave and whether there were any amendments or extensions to his existing 140-day military leave.

In the first few days of December, 1984, Eidukonis discussed with Major Stout a 26-day extension of his 140-day tour of duty. Eidukonis expressed a willingness to be extended without consulting Boyd or anyone else at SEPTA. Eidukonis accepted the 26-day extension in the first few days of December, 1984. On December 6, 1984, Major Stout wrote a disposition form requesting Eidukonis for an additional 26 days at the conclusion of the 140-day tour of duty that was to finish on Friday, February 15, 1985. This meant that Eidukonis would continue at Fort Indiantown Gap until Friday, March 15, 1985. He then would travel to Fort Monroe on Monday, March 18, to begin the two weeks of annual training until March 30, 1985. Eidukonis, therefore, arranged five consecutive tours of duty that caused him to be away from his employment during the entire budget cycle - September through March.

On December 4, 1984, Major Doyle forwarded to Walsh a response to Walsh's letter dated November 20,

1984. Major Doyle's letter explained that the Army knew of no additional military leaves or amendments to the 140-day tour of duty that Eidukonis was then on. These representations were made to SEPTA despite the fact that Eidukonis, in October, 1984, arranged for a tour of duty to begin on March 18, 1985. Furthermore, in the first week of December 1984, Eidukonis had accepted a 26-day extension to the 140-day tour of duty that ended on February 15, 1985.

Eidukonis saw and reviewed Major Doyle's letter before it was sent to Walsh on December 4, 1984; yet, he made no effort to have Major Doyle indicate in his letter that he had arranged the 26-day extension to the 140-day tour of duty or his two-week tour of duty to begin on March 18, 1985. Eidukonis admitted to having expressed acceptance of the 26-day extension on either December 1, 2, or 3, 1984, but definitely prior to Major Doyle's letter being sent to SEPTA.

Eidukonis testified that he "pretended" that he was unaware of the exchange of correspondence between Walsh and Major Doyle concerning his extended military leave. When questioned as to why he did not inform Boyd in December, 1984, or January, 1985, about the 26-day extension to the 140-day tour of duty and the two-week tour of duty for March, 1985, he pointedly stated that he was "playing poker" with SEPTA. Eidukonis admitted that he could have gone back to SEPTA and could have refused the 26-day extension and scheduled the two-week tour of duty for March at anytime. Eidukonis' explanation for not returning to work was his desire to bring his work related problems with Boyd "to a head". In November, 1984, Eidukonis went to a JAG officer and sought legal advice, yet still chose not to communicate with SEPTA or Boyd concerning his plans to take new leave.

On December 7, 1984, three days after Major Doyle sent his letter to SEPTA, Eidukonis made a phone call to SEPTA's Office of Civil Rights requesting the necessary

forms to file a complaint against Boyd about a performance evaluation he had received. This was the third or fourth internal complaint Eidukonis filed complaining about perceived discrimination against him. At the time he requested the complaint forms, he did not inform anyone at SEPTA of the additional leaves he had arranged.

Eidukonis testified that he could have refused the 26-day extension to the 140-day tour and, indeed, could have refused any of the military tours he was offered. Lt. Colonel Wilson, the Army Personnel Management officer responsible for career guidance to Eidukonis, testified that had Eidukonis refused an extension to the 140-day tour, there would have been no adverse consequences to Eidukonis. In addition, Lt. Colonel Wilson stated that a reservist's refusal to accept a tour of duty or an extension to a tour of duty will not affect his status or standing in the Individual Ready Reserve. Once Eidukonis completed the 140-day tour of duty, he had fulfilled his Army obligations. The extension of 26 days was a separate matter, and there would have been no negative ramifications to Eidukonis if he returned to SEPTA after his 140-day tour ended on February 18, 1985. Indeed, at one point, Eidukonis' tour was shortened due to high blood pressure. In the event he was unable to complete the tour, the PMO would have filled the tour with another reservist. Lt. Colonel Wilson was very critical of the manner in which Eidukonis' military orders were arranged.

On February 8, 1985, Eidukonis called Boyd and for the first time, told him that he was extending his 140-day military leave by 26 days, and at the conclusion of that extension he was taking an additional two-week tour of duty in March. On February 8, 1985, Boyd advised Eidukonis that he would let him know his response to Eidukonis' request for two additional leaves.

On February 11, 1985, Boyd advised Eidukonis that he was needed back at SEPTA on February 18, 1985. Eidukonis was needed because the period of January

through March was the busiest time for Boyd's department. During this period, Resource Control was grappling with winter conditions, maintaining the various locations, carrying out budget preparation, taking inventory of the store rooms and was experiencing conflicts with SEPTA's finance department. All of these responsibilities were compounded with the problems raised by the location move and the assumption of new responsibilities by Boyd's department. Boyd testified that during Eidukonis' absences, he maintained Eidukonis' desk and work location, and he was not permitted to replace Eidukonis with a full-time employee.

Only after February 11, 1985, did Eidukonis send Boyd copies of the orders extending him 26 days and scheduling him for a two-week tour of duty beginning on March 18, 1985. Significantly, Eidukonis was in possession of these orders as early as the fall of 1984.

On February 18, 1985, Boyd had anticipated Eidukonis' return and planned for Eidukonis to work on the budget, assist with the inventory and complete the acquisition of Light Rail Vehicle (LRV) parts. Boyd had expected Eidukonis back after each leave. Each time Eidukonis promised that he would return and then requested additional leaves.

Eidukonis did not return to work on February 18, 1985; therefore, he was suspended pending discharge for failing to follow a directive of his supervisor. An internal post-determination hearing was held on Eidukonis' discharge and the discharge was upheld. A transcript of that proceeding as it related to the sworn testimony of Eidukonis was admitted into evidence during the trial of this matter.

An Individual Ready Reservist only has to accumulate fifty (50) points per year to remain in good standing. A reservist is automatically given fifteen (15) points for being in the reserve and may accumulate points through correspondence courses, weekend drills or training. After six and one-half months of military leave (August 14, 1984 to February 15, 1985), Eidukonis had accumulated

194 points (including the 15 points a reservist automatically receives). The additional points (144) cannot count towards maintaining good standing in the following year. Rather, any points over 50 are counted towards the reservist's pension. Eidukonis accumulated 232 points between August 14, 1984, and April 1, 1985. Eidukonis conceded that enhancing his military pension was an important personal goal. Eidukonis also testified that his annual earnings of \$40,000 per year in the Army exceeded his annual earning of \$30,000 per year at SEPTA and a significant portion of his Army pay was tax-free.

Eidukonis was not training for a new skill. Instead, he was utilizing his existing skills as a computer programmer. In essence, the Army was utilizing civilian personnel for budgetary reasons. Indeed, individuals other than Eidukonis could have performed the job for the Army. In September of 1984, Eidukonis had a high blood pressure problem and this would have precluded him from continuing on the 140-day tour of duty. The PMO testified that if Eidukonis could not complete the project, they would find someone else.

Subsequently, Eidukonis brought suit in the United States District Court for the Eastern District of Pennsylvania, claiming that his reemployment rights under the Veteran's Reemployment Rights Act, 38 U.S.C. Section 2021-2026 (VRRRA) was violated by his termination. Eidukonis sought monetary relief. On May 24, 1988, the District Court filed a bench opinion. The District Court applied a "reasonableness" test to the employee's leave requests. However, the District Court refused to consider the length of the absence, the burden on the employer and Eidukonis' admissions of bad faith. The District Court found that Eidukonis had been remiss and not forthright, however, the District Court did not make a finding of bad faith.

On June 2, 1988, the District Court filed an Order that judgment be entered in favor of plaintiff, Kestutis

Eidukonis and against SEPTA for \$83,526.39. On appeal, SEPTA argued the burden on the employer and Eidukonis' admittedly bad faith conduct. In addition, an evidentiary issue was addressed, namely the District Court's refusal to permit testimony from an ombudsmen with the National Committee for Employer's Support of the Guard and the Reserve.

The Third Circuit remanded the case for further consideration. The Third Circuit in *Eidukonis I*, (873 F.2d 688) outlined the following factors to consider in evaluating the reasonableness of the reservist's request for leave: (a) an employee's option to schedule military leaves at different times; (b) the length of the requested leave; (c) whether the leave request is for an extension of the leave or for a new leave; (d) the timing of the leave request; (e) whether the employee knew that a leave or extension was a possibility; (f) the employee's bad faith or lack thereof; and (g) whether the employee was following the advice of military counsel. With respect to the last factor, the Third Circuit held that limited weight can be given to this because the military may view an employee's right to leave as unlimited.

The Court went on to hold that the legitimate needs of the employer must be taken into account. The relevant factors consist of: (a) the burden to the employer; (b) the special needs of the employer for the employee; (c) the employer's ability to find a substitute to assume the employee's duties; (d) special circumstances concerning the work load for the period for which leave is requested; (e) the additional costs incurred by the employer if it were to accommodate the reservist's request; (f) whether the employer denies leave for military purposes while allowing them for other purposes; and (g) the clarity of the employer's policy with respect to military leave. The Third Circuit also held that this list of factors was not meant to be inclusive, but provided no guidance as to what else is relevant.

No additional testimony was taken on remand because the Army pressured Colonel Marion, the ombudsman, not to testify or risk the disenfranchisement of the Chapter's Liaison Committee. The District Court again found in Eidukonis' favor. The Court found that the employee gave reasonable notice, acted in good faith, that the Army work was important, and that firing Eidukonis did not solve SEPTA's problems. The District Court (757 F.Supp. 634), further found that the employer had acted in bad faith and did not consider its previous holding that the employee had been remiss and not forthright. The District Court never considered that Eidukonis made *two* additional requests for leave. The District Court only considered the request for the 26-day extension and completely ignored that Eidukonis was taking another 2 weeks to follow the 26 days. The District Court also held that the employer had failed to work out problems with the employee and that an estoppel defense existed against SEPTA since the employer had previously allowed extended leaves. The District Court held that SEPTA acted in bad faith because SEPTA had previously granted extended leaves to Eidukonis and did not notify Eidukonis of its change in policy toward him.

In the second appeal, SEPTA argued that all evidence of Eidukonis' bad faith was ignored and that notice was not reasonable. SEPTA further argued that the estoppel argument could not withstand scrutiny because Eidukonis had never previously absented himself during the entire budgetary cycle of the department. This particular budgetary cycle was more burdensome than any other budgetary cycle because of the move and the two-fold increase in work. Moreover, SEPTA pointed out that from October, 1984, through December, 1984, it had attempted to discover Eidukonis' true intentions regarding additional leaves and that its attempts were blocked because Eidukonis deliberately concealed his requests for additional leaves. SEPTA noted that Eidukonis was clearly on notice of SEPTA's concerns about

his extended leave given Eidukonis' knowledge of SEPTA's efforts to determine the nature and extent of his leave. SEPTA also argued that Eidukonis had made promises to return which were repeatedly broken. SEPTA further argued that while the District Court acknowledged that Eidukonis admitted to "playing poker" with SEPTA, the District Court's finding that this admission of bad faith did not apply to the requests for two leaves made to Boyd in February, 1985, was clearly erroneous. Moreover, the District Court never weighed Eidukonis' admission that he "pretended" to be unaware of SEPTA's inquiries.

Additionally, on appeal, SEPTA argued that the District Court improperly considered additional factors, namely, the importance of the military job and that firing the employee would never solve the employer's problem. If the importance to the military is considered paramount (even in peace time) and a court concludes that firing simply will leave the employer short-handed, the reservist's leave will never be "unreasonable" given the District Court's application of the Third Circuit's test of "reasonableness".

Finally, SEPTA argued that the District Court's finding that SEPTA failed to make reasonable efforts to find a replacement for Eidukonis plainly ignored the uncontroverted evidence that Boyd did not have the ability to obtain a replacement employee at management level.

The District Court opinion was affirmed by the Third Circuit without an opinion by way of judgment order. A petition for the rehearing en banc was denied.

REASONS FOR GRANTING THE WRIT

A. PENDING BEFORE THE SUPREME COURT ARE TWO OTHER CASES THAT ADDRESS THE ISSUE OF A RESERVIST'S RIGHT TO MILITARY LEAVE FROM HIS EMPLOYMENT.

Certiorari has been granted in the case of *William "Sky" King v. St. Vincent's Hospital*, No. 90-889. At issue is whether or not §2024(b) of the Veteran's Reemployment Act requires that a reservist's conduct be evaluated under a "reasonableness standard". In *"Sky" King*, 902 F.2d 1068 (11th Cir. 1990), the Eleventh Circuit found that §2024(d) contains a reasonableness standard. The Eleventh Circuit found that three years for training was *per se* unreasonable. The Eleventh Circuit, in weighing whether the request was reasonable, looked to the reservist's conduct and held that a leave of exceptional duration might amount to bad faith conduct justifying denial of the leave. On appeal, the Solicitor General has argued that a reasonableness test undermines the statute and has created a vague standard that generates uncertainty for both employers and potential recruits. The Solicitor has argued that there is no requirement under §2024(d) that the leave be reasonable. Respondent has argued that a 90 day limitation for leaves is the appropriate standard or, alternatively, a reasonableness test should be utilized. The District Court and Circuit Court in *King* did not enunciate the factors to be considered in assessing reasonableness.

In *Kolkhorst v. Tilghman*, 897 F.2d 1282 (4th Cir. 1990), petition for *cert. pending*, No. 89-1949, a municipal police department placed a strict upper limit on the number of reservists in the department. The plaintiff was denied permission to join a Marine Corps reserve unit because his department exceeded the quota. The Fourth Circuit found that the reasonableness test is not required and that leave is unconditional.

The case of *Eidukonis v. Southeastern Pennsylvania Transportation Authority* would enable the Court to fashion the appropriate reasonableness test. Granting the writ also will allow the Court to rule on whether a leave request can ever be reasonable if the reservist admits that he concealed from his employer notification about his leaves because of a desire to "play poker" with his employer (admitted bad faith). The "poker playing" was motivated by his desire to bring his work related problems to a head.²

Moreover, granting the writ would allow the Court to explore whether unlimited leave is appropriate when the leave is not for war or peace-keeping or obtaining a new skill, but rather when the leave is to assist the military in completing projects for which full-time military personnel have not been budgeted.

Granting the writ would also allow the Court to set guidelines as to when a reservist must provide notice to an employer of planned military leaves. Should notice be given when the leave, tour or extension becomes a possibility, or should notice be provided only when the orders are issued, as suggested by the District Court and Third Circuit in *Eidukonis*. (See discussion *infra* Section D.)

2. Recently, in *Boyle v. Burke*, 925 F.2d 497 (1st Cir. 1991), the First Circuit was faced with a policy by the Portsmouth Police Department which restricted outside employment. This policy was interpreted to preclude officers' active participation in the reserves. The reason cited by the city was concern over the city's ability to provide police protection in the event an officer's reserve obligation created inadequate staffing. Subsequently, the policy was amended to permit reserve participation. The amended policy instructed department supervisors to negotiate schedule conflicts with the reservist-employee's commanding officer. This was alleged to have violated the Act. The First Circuit examined the precedent in *Lee*, *Gulf States*, *Eidukonis* and the holding in *Kolkhorst* and found that the standards varied. Instead of adopting a standard, the Court simply found that "they could not clearly find that the reservist's rights were violated". *Id.* at 503.

B. THE THIRD CIRCUIT'S TEST IS AT ODDS WITH THE REASONABLENESS STANDARDS ENUNCIATED BY OTHER CIRCUITS.

Section 2024(d) does not expressly impose any number, frequency or duration limitations. However, the general words in §2024(d) are to be tempered by standards of statutory construction to avoid unreasonable consequences and in a manner that saves, not destroys, the purpose of the statute. Despite this principal of statutory construction, the Court of Appeals have not been consistent in defining the so-called "reasonableness" test.

The first appellate court to apply the reasonableness standard to a military leave requested under §2024(d) was the United States Court of Appeals for the Fifth Circuit in *Lee v. City of Pennsacola*, 634 F.2d 886 (5th Cir. 1981). Lee, a police officer and captain in the Florida National Guard, requested and was granted a leave of absence by the City of Pennsacola for approximately two months to attend the National Guard Transportation Officer Advanced Course. After beginning the course, he requested from the military an extension to his leave. Lee was negotiating with his military superiors for the extension, however, no approval for additional leave was sought from his employer. When Lee finally made his request to his employer, it was denied and he was terminated from his employment. During the negotiations with the National Guard, Lee never apprised his employer of his intention to seek an extension. Rather, Lee waited until he received actual orders before he informed his employer about his extension. Furthermore, Lee did not reveal to his employer that it was not necessary to complete all the course that year and that there were alternatives. The Court in *Lee* emphasized the employee-reservist's bad faith conduct given the undisclosed negotiations with the military and the timing of Lee's notification to his employer.

In *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir. 1987), the Eleventh Circuit adopted a reasonableness test. The Eleventh Circuit found that protection under §2024(d) depended upon the length of the leave request, the conduct of the employee in requesting the leave and the burden on the employer. The Court in *Gulf States Paper Corp.* found the leave request reasonable. The Court contrasted the reservist's conduct to that in *Lee*. In *Lee*, there was bad faith since the employee reservist knew of the leave and withheld information from the employer, precisely the facts in *Eidukonis*.

The Circuit Court in *Eidukonis v. Southeastern Pennsylvania Transportation Authority*, 873 F.2d 688 (3d Cir. 1989), adopted a "totality of the circumstances" reasonableness standard in reviewing leave requests under §2024(a). The Third Circuit rejected the "three factors" test established in *Gulf States Paper Corp.* and rejected the bad faith test in *Lee*. Here, however, the District Court on remand engrafted three additional factors on the Third Circuit's totality of the circumstances test: 1) the employer must attempt to work out problems with the reservist, even if information is deliberately concealed from the employer; 2) the importance of the military duty; and 3) a consideration of whether firing an employee who failed to return to work was a solution to the employer's problem.

A review of the various Circuit Court standards shows that if *Eidukonis* was decided in the *Lee* or *Gulf* Circuits, SEPTA would have prevailed. If the *Lee* court was faced with the *Eidukonis* facts, then the employer would prevail because of *Eidukonis*' admission that he concealed information about his leaves from his employer as part of his desire to "play poker" with SEPTA, i.e., admitted "bad faith", and did not timely apprise the employer of the leave dates. If the *Gulf States Paper Corp.* Circuit addressed the *Eidukonis* facts, SEPTA would likewise prevail since *Eidukonis* did not promptly

advise his employer of the leaves when he knew they were a possibility and his conduct was akin to "bad faith".

The obvious problem with the Third Circuit's totality of the circumstances approach is that the District Court can freely supplement the thirteen point test and, consequently, there is no meaningful standard to guide reservists and employers. Currently, the standards vary from one jurisdiction to another and will vary from District Court to District Court in the Third Circuit — a situation Congress surely did not intend. A definitive decision by the Supreme Court is essential to make uniform the law affecting thousands of reservists and employers governed by the provision of the Veterans Reemployment Rights Act.³

C. THE DISTRICT COURT'S REASONABLENESS TEST IMPROPERLY PLACES THE BURDEN OF ACCOMMODATION ON THE EMPLOYER.

The District Court on remand added to the factors enunciated by the Third Circuit. The District Court looked to the military's need, the fact that a firing would not aid the employer's short-handed staff and that the employer had a duty to work out the problems with the employee. As presently structured and applied, the test of reasonableness in the Third Circuit strikes a balance that on its face requires a finding in favor of the employee and allows a District Court to consider any factor it considers relevant. The Third Circuit test provides no guidance since it is limitless as to what can be considered relevant.

3. Notably, Eidukonis served longer than President Bush is able to summon troops for active duty in the Gulf to augment the active forces. *See*, 10 U.S.C. Section 673(b). Therefore, Eidukonis was serving for a period of time that exceeded the President's authority. Eidukonis served over 180 days without being on active duty or on a peacekeeping mission and he was not obtaining a new skill.

1. *The Burden is Not on the Employer to Make Unreasonable Accommodations.*

The District Court has improperly shifted the burden to the employer. Employees under §2024(d) are expected to be part-time soldiers and full-time employees. In *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981), the Supreme Court ruled that an employer did not have to make special accommodations for reservists by adopting individualized accommodations for the reservist, such as a change in work hours. Despite this mandate in *Monroe*, the Third Circuit accepted the District Court's conclusion that the employer had a duty to work out problems with Eidukonis even though he was concealing information about his leaves and acted in bad faith. Contrary to the District Court's finding, the Act does not give a reservist unbridled control over his employer which has been permitted in this case. The District Court's opinion required the employer to work out its problems and reach an accommodation with the reservist, even though the reservist concealed information about his leaves, pretended he was unaware of the inquiries of the employer to determine if there was any additional leave, and admitted that he was using his leave to work out his employment related problems. It is apparent that the District Court placed a burden on the employer that is contrary to the Supreme Court holding in *Monroe v. Standard Oil, supra*.

2. *In Peacetime, the Importance to the Military is an Improper Consideration.*

Without question, the military will always argue that the military duty is more important than the private sector. In this instance, Eidukonis was on special active duty training involving computer programming. A review of the testimony indicates that Eidukonis was not advancing new skills. Instead, Eidukonis had volunteered for the duty and utilized his existing skills. Eidukonis was utilized for budgetary reasons by the Army. Eidukonis had health problems when he began

the 140 day tour. In the event he was unable to continue, his PMO testified the Army would simply get someone else to fill the position with the same computer skills.

The statute speaks in terms of leave of absence to “perform active duty for training or inactive duty training”. At issue is whether the statute intended unlimited leaves when no new skill is acquired and the duty is voluntary. In this instance, the District Court failed to take into account the type of work Eidukonis was performing. Simply because it was for the military it was deemed important. In essence, the District Court’s holding deems the employee-reservist more soldier than full-time employee. This is also contrary to *Monroe*.

3. *It is Improper to Consider that Terminating a Reservist will Leave an Employer in the Same Short-Handed Position as if the Reservist was on Leave.*

The District Court further found that firing an employee will not solve the problem of the employer being short-handed. In this case, Eidukonis repeatedly expanded his leave taking and absenting himself from SEPTA during five consecutive requests for leave. There were numerous promises that additional leaves would not be taken, however, each assurance was broken. Therefore, SEPTA was unable to determine when Eidukonis would return to work. This forced SEPTA to hold open Eidukonis’ position for an indefinite period of time.

SEPTA is a quasi-government agency with unionized non-management employees. SEPTA is a non-profit agency. Funding is not generated via profit or private investors. Funding is derived from a variety of government sources. Unlike the civil sector, budgetary constraints did not allow for hiring temporary help. A finding that a firing does not solve the problem would automatically swing the balance to the employee and nearly any leave under any set of circumstances must be deemed reasonable in light of this additional factor. This

consideration cannot be a factor since it is unlikely that employers could ever demonstrate that a replacement employee could be integrated into its management workforce and perform as efficiently as an employee who had over three years experience in the position.

The District Court engrafted onto the Third Circuit's test of "reasonableness" a factor that can *only* weigh against the employer when the reservist is in management. This factor is illogical to consider, given the variety of jobs that reservists can perform for an employer which are technical in nature and require experience with the particular business of the employer. Experience suggests that the modern workplace is far too complex to expect an employer to be able to train a new management employee in the complexities of its business and integrate that employee in one and one-half months. It is impractical to expect that a newly integrated employee could obtain the same level of performance that a three year employee could bring to the task, if the three year employee, unlike Eidukonis, is at the job. No employer would ever decide to fire if the only parameter for that decision was the amount of time it takes to train a new employee. There are many other factors that go into the decision to terminate, including insubordination, attendance, punctuality, cooperation, respect for supervisors. In this case, there was no assurance that the leaves would not continue. This continued leave taking is even more disruptive to an employer than a request to go on military leave for training for a new skill, such as a mechanic, for a finite period of weeks. At least there, the employer would be certain of when that employee would be back to work.

In the context of this case, the decision to fire is not based solely on the training time it takes to fill the slot; the termination was necessary because of the reservist's refusal to return when he promised and when he could have without adverse consequence to his military obligations.

D. THERE IS A NEED FOR UNIFORMITY TO DETERMINE WHAT CONSTITUTES ADEQUATE NOTICE.

The District Court found that Eidukonis provided adequate notice to SEPTA of his additional one and one-half months of military leave. The District Court based its finding, in part, on the fact that Eidukonis notified SEPTA of his additional one and one-half months of leave when he received the "actual orders" for the February, 1985 extension; those orders were received in February, 1985. The District Court also reasoned there was adequate notice to SEPTA because Eidukonis previously said in October, 1984, that he "may take additional leave".

The District Court's findings ignore the fact that Eidukonis knew about his two-week annual leave scheduled for March, 1985, as early as October, 1984, and knew about the 26-day extension to the 140-day leave as early as December, 1984. Moreover, in October, 1984, and again in December, 1984, Eidukonis did not tell Boyd when and for how long the leaves were going to be even though the leaves were already arranged. Eidukonis admitted to deliberately concealing this information from SEPTA. The additional 26-day extension and two-week March leave, which were voluntary and could have been refused without adverse consequences to Eidukonis, were deliberately timed to follow Eidukonis' existing leave. The District Court's reasoning on the notice issue, which was upheld by the Third Circuit, is at odds with the notice standards set forth in *Lee, supra*; *Gulf States, supra*; and *Sawyer v. Swift & Co.*, 836 F.2d 1257 (10th Cir. 1988).

The Circuit Court in *Lee* required a reservist to advise the employer as soon as the possibility of the leave occurred. In *Lee*, the record disclosed, and the Circuit Court found significant, that for several weeks prior to a request for an extension of the leave, Lee was negotiating with his military superiors for the extension. During the negotiations, Lee had no communication with the

police department to advise them that he was seeking an extension of his training period. Rather, Lee waited until he received actual orders before he informed his employer. Similarly, in *Gulf States*, the Circuit Court condemned the withholding of information about further leaves and viewed this as being akin to "bad faith". Finally, in *Sawyer v. Swift & Co.*, *supra*, the plaintiff claims that in the beginning of December, he gave verbal notice of a make-up drill that was to occur the first non-holiday week in January, the weekend of January 8th and 9th. Later in December, Sawyer provided orders for a January 22nd drill. Nevertheless, he was posted for overtime duty for the 22nd by his employer. When the list was posted, Sawyer did not advise his employer he would not be working. Sawyer did not appear for work and was terminated. The Court found that notice was not specific and that Sawyer's reserve status did not eclipse his ordinary obligations to his employer. *Id.* at 1260. Thus, the Tenth Circuit reversed the lower court's finding that notice was adequate in the beginning.

Eidukonis is at odds with *Lee* and *Gulf States* as to when the employer must be advised of the leave. Likewise, *Eidukonis* is at odds with the notice requirements of *Sawyer*. The standard of when an employee must advise an employer of a leave should not vary by jurisdiction. It is incumbent upon the Supreme Court to develop a consistent notice standard for an employer to receive notification when an employee is going on reservist duty, whether it be for training, for a new skill, a two week tour or special active duty training. The Supreme Court should develop a "notice" standard that requires the reservist to fully inform the employer once they are requesting a leave. Such a standard is not the law in the Third Circuit which is in direct conflict with other Circuits. The Third Circuit standard allows the reservist to have unbridled control over the employer, permits flagrant abuses such as that occurred here and condones manipulative and deceptive conduct on the part of the reservist/employee.

CONCLUSION

For all the foregoing reasons, the Petition should be granted.

Respectfully submitted,



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DATED: November 12, 1991

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KESTUTIS EIDUKONIS	:	Civil Action No. 86-5142
	:	
vs.	:	Philadelphia, Pennsylvania
	:	
SOUTHEASTERN PENNSYLVANIA	:	Tuesday, May 17, 1988
TRANSPORTATION AUTHORITY	:	

BENCH OPINION BEFORE THE HONORABLE J. WILLIAM DITTER, JR. UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

Counsel for Plaintiff:

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Counsel for Defendant:

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Reported by: ROSE A. TOLCHIN, RPR, CM
Official Court Reporter
United States Courthouse
601 Market Street, Room 2722
Philadelphia, Pennsylvania 19106
(215) 928-9760

Proceedings recorded by mechanical stenography, trans-
script produced by computer-aided transcription

(Whereupon, the Court began proceedings at 4:15 p.m.)

THE CLERK: Will counsel please state their name for the record and who they represent.

MR. BAUER: Robert Bauer for the plaintiff, Kestutis Eidukonis.

MR. KRENZEL: Saul Krenzel for the defendant, SEPTA.

THE COURT: I find for the plaintiff in this matter and conclude that he is entitled to an award of money damages. I make the following findings of fact.

Plaintiff, Kestutis Eidukonis, is an adult male residing at 248 East Broad Street, East Stroudsburg, Pennsylvania.

Defendant, Southeastern Pennsylvania Transportation Authority, is a duly organized corporate authority which maintains an office at 1515 Market Street, Philadelphia, Pennsylvania.

Plaintiff started employment with SEPTA as a production control specialist on April 20th, 1981.

At the time he applied for his position at SEPTA, plaintiff stated on his application for employment that he was a member of the United States Army Reserve.

At all times relevant to this case, plaintiff was a major in the United States Army Reserve.

To maintain active status in the Army Reserve, a reservist must accumulate 50 points in one year. 15 points are automatic for maintaining an active status. The other 35 points can be obtained by attending two weeks annual training, taking correspondence courses, drilling and other available means.

Any points obtained in excess of 50 points cannot be applied by a reservist to another year. Additional points accumulated in one year are, however, factored into the reservist's pension benefits.

A reservist must express willingness to accept military duty which exceeds two weeks. A refusal to take training beyond the two week annual training in theory will not adversely affect a reservist's status. However, in

practice, a variety of assignments and experiences may enhance the potential for promotion.

SEPTA provided to its supervisory, administrative or management employees a handbook which set forth the company's employment policies, including those pertaining to military leave.

Prior to February 5, 1985, SEPTA had no written employment policy which limited the right of an employee to take leave for the performance of military duty.

While employed at SEPTA, plaintiff was granted military leaves so that he could go on military duty as follows: In 1981, from April 24th, 1981 to September the 26th of 1981, a total of 153 days; in 1982, from April 21st to September the 13th, a total of 144 days; in 1983, from June 10th to July 11th, 32 days; from July 31st to August 26th, 27 days; from October 3rd to October 31st, 29 days, a total of 88 days. In 1984, 1985, from August the 13th of 1984 to August the 26th of 1984, 14 days. From September the 5th of '84 to September the 30th of '84, 26 days; from October the 1st of 1984 to February the 18th of 1985, 140 days.

In each instance, SEPTA consented to plaintiff's taking employment leave so that he could perform military duty with the Army Reserve.

In each instance, plaintiff notified his supervisor orally of his plans for military service and later confirmed these periods of absence from employment in writing.

In 1984, the department in which Mr. Eidukonis worked at SEPTA was burdened because it was being moved from one location to another. Accordingly, Mr. Eidukonis' supervisor, Ollin Boyd — I said that wrong. Accordingly, Mr. Eidukonis' supervisor, Ollin Boyd, stated that all individuals should postpone their vacation plans until the summer of 1984 so that there would be no conflict with the moving of the department.

In the spring of 1984, Mr. Eidukonis discussed his two weeks annual training duty with Mr. Boyd stating it was planned for August. Mr. Eidukonis also stated that

he would not be taking additional time for military training that year beyond the two weeks in August.

Plaintiff's military service from September 5th to September 30th, 1984 was performed at Fort Indiantown Gap. During this tour of active duty, plaintiff was assigned the task of preparing a computerized schedule for the weapons' firing ranges at Fort Indiantown Gap. This program involved the efficient use of training facilities and the safety of military personnel. It involved obtaining the necessary hardware and creating the necessary computer programs.

Plaintiff's tour at Fort Indiantown Gap was extended from October 1st, 1984 to February 16th, 1985, so that he could continue the work on the firing-range scheduling program.

SEPTA consented to plaintiff's military leave from August 13 to August 26, 1984, his vacation of one week, which followed, his military duties from September 5 to September 30, 1984 and his military duties from October 1st, 1984 to February 16th, 1985.

In notifying SEPTA of his periods of military duty, plaintiff followed the same procedure that he had followed as to previous requests for original duty or extensions; that is, he notified his supervisor of the periods of active duty and followed up oral notifications in writing.

No one at SEPTA, either orally or in writing, advised plaintiff of any objection to any period of leave, the time of year he took that leave, when he should take the leave and there would be no objection to it, the manner in which his requests for military leave were submitted or the amount of notice given to SEPTA of the requests for military leave.

In November 1984, defendant's attorney, Vincent Walsh, called Fort Indiantown Gap and asked whether plaintiff was in fact on military duty there. Plaintiff was informed of this call by Major Dennis Olgin who had received it. Thereafter, Mr. Walsh wrote a follow-up letter to the military authorities at Indiantown Gap

making a similar request for information and plaintiff knew of that letter.

On October 29, 1984, plaintiff informed his immediate supervisor, Ollin Boyd, that his 140 day period of active duty with the Army might be extended. He told Boyd that he was doing vital work for the Army and that he was the only one that the Army felt was competent to be placed in such a critical position.

On February 5, 1985, the Army approved a request from Fort Indiantown Gap that plaintiff's period of active duty be extended for 26 days so that he can complete his firing range scheduling assignment.

On February 8, 1985, plaintiff told his immediate supervisor, Ollin Boyd, of the fact that his period of military service was being extended.

By letter dated February 11, 1985, Mr. Boyd advised plaintiff that if he did not return to work at SEPTA on February 18, 1985, his employment status at SEPTA would be placed in jeopardy.

February 18, 1985 was the first SEPTA workday following plaintiff's completion of the 140 day tour of active duty that started October 1, 1984.

Plaintiff did not report for work on February 18, 1985 at SEPTA, but remained at Fort Indiantown Gap where he was still on military duty as a result of the 26 day extension of the period of service that he had been scheduled to terminate on February 16, 1985.

Plaintiff was terminated by SEPTA solely because of his failure to report back from military duty on February 18, 1985, and not because of any previous military leaves, not because when he took those military leaves, not because of when he took the military leave that was — that ended on February 16, 1985, not because of notices given concerning those leaves, not because of the number of his prior military leaves, not because of the length of his military service, not because of his job performance, not because he had filed civil rights actions, not because he had made derogatory comments about SEPTA supervisors, not because of his desire for

promotion, not because of his desire for a transfer and not because he broke any promises about seeking military duty.

Plaintiff's tour of duty at Fort Indiantown Gap was extended and re-extended on September 5, 1984 to March 15, 1985.

By orders dated November 23rd, 1984, plaintiff was ordered to active duty for training at Fort Monroe, Virginia to commence March 18, 1985. Plaintiff did not inform his supervisor, Ollin Boyd, until February 8, 1985 of the orders for his active duty for training at Fort Monroe, Virginia.

When plaintiff was told by Ollin Boyd to report to work on February 18, 1985, or that his continued employment status at SEPTA would be in jeopardy, he consulted the legal officer at Fort Indiantown Gap, Major Dennis Olgin. Major Olgin advised plaintiff that SEPTA could not terminate him because of his continued military duty and his failure to report for work on February 18, 1985.

Plaintiff in good faith believed that SEPTA could not terminate his employment because of his failure to report for work on February 18, 1985.

Plaintiff acted reasonably and in good faith in notifying Mr. Boyd in October, 1984, that his period of active duty might be extended; in notifying Mr. Boyd of that extension within three days of learning that it had been approved; and in accepting the extension and completing an important assignment at Fort Indiantown Gap.

Under all circumstances, plaintiff was not guilty of any bad faith towards SEPTA.

Under all circumstances, plaintiff's refusal to return work on February 18, 1985 was not unreasonable.

Under all the circumstances, it was unlawful for defendant to terminate plaintiff's services as its employee.

Plaintiff is entitled to recover money damages.

So much for my findings of fact. This next might be called comment.

Mr. Krenzel has argued, and quite persuasively, that the plaintiff was guilty of deliberate bad faith because he refused periods of military duty that were offered to him and did not notify SEPTA as promptly as he could have that he would receive or have received orders to active duty or to extend his active duty.

Defendant argues that this bad faith was motivated by plaintiff's dislike for SEPTA and his dislike for his superiors, and specifically his dislike for Ollin Boyd, his dislike for other SEPTA superiors, his desire to get even with SEPTA for its failure to promote him, his desire to get even with SEPTA for its failure to transfer him to another department and his general dislike for SEPTA.

While it is true that plaintiff made derogatory comments about some of his superiors, and was not as open with them as he could have been, what he did or failed to do did not amount to bad faith. He may have enjoyed military life more than he enjoyed working at SEPTA. He may have had a greater feeling of accomplishment when on military duty than he did when working at SEPTA. He may be patriotic. He may have been insensitive to SEPTA's needs and those of his supervisors. He could have been more forthright.

In hindsight, he may have been remiss in not sharing as soon as possible with everyone and everyone at SEPTA who would listen to him that he hoped or planned to go on active duty at a specified time. But he was not terminated for any of these failings and lapses, in whole or in part.

The fact is the plaintiff was terminated for failing to report to work on February the 18th of 1985 when he was ordered to do so. And all this must be said in context.

In prior years, plaintiff had requested and had been given extended periods of leave so that he could be on active duty with the Army. Within a week after he started work at SEPTA in 1981, he went on military leave for 153 days; in 1982, he had 144 days of military leave; in 1983, he had 88 days of military leave; in

1984-1985 he had 140 days — 180 days, all these leaves without censure, reprimand, warnings or any other disapproval from SEPTA.

Then suddenly on February 1985 and without prior warning, without notification there was a different rule and plaintiff was told to report to SEPTA within the week, and at that time he was in the middle of an important project for the Army, one that involved the efficient use of training facilities and the safety of military personnel.

I will confess that my decision in this case might be entirely different if Mr. Boyd had said this is it. No more military leave during inventory and budget time. No more leave unless we get X days of notice. No more leave beyond two weeks a year or three weeks or four weeks or whatever. And then the plaintiff had violated those terms or conditions. But that's not what occurred.

All or any of those conditions and many more might have been completely reasonable, and plaintiff's failure to comply with them completely unreasonable, but that certainly is an area of speculation.

What happened was that the plaintiff refused to report on February the 18th when he was involved in an important project for the Army.

Under all the circumstances, it was reasonable for him to refuse to report, and therefore, he should not have been terminated by SEPTA.

I reach the following conclusions of law. The Court has jurisdiction over the parties and the subject matter of this action.

Defendant violated the Veteran's Reemployment Rights Act, 38 United States Code, Section 2021, et cetera, when it terminated his employment on April 13, 1985.

Under the terms of the Act, SEPTA was required to reinstate plaintiff to his position of employment unless he acted unreasonably with regard to his taking of military leave.

Under all the circumstances, plaintiff did not act unreasonably with regard to the period of military leave from February 18 through March 15, 1985.

Defendant is liable to plaintiff for his lost wages and for losses incident to his employment as follows:

And the figure that I have is \$110,517.08, which I got from plaintiff's computations, and the first thing that I would do after I answer any — hear anything that either of you may have to say, which is not intended to be an invitation to ask me to change my findings or my conclusions, but the first thing that I want to do is to meet with counsel because I am not satisfied that the figure that I have just stated, \$110,517, is the right figure, and I wish to discuss it with counsel because I may wish to amend that figure, either up or down, depending upon what we say about it.

But is there anything anybody wants to say with regard to anything that I have said? And I am not inviting you to try to change my mind, because you won't.

MR. KRENZEL: I am just questioning the damage calculation, Judge.

THE COURT: That's what I want to meet with you about.

MR. KRENZEL: I think there is a mitigation aspect.

THE COURT: Well, that's why I want to meet with you.

MR. KRENZEL: Very well, Judge.

MR. BAUER: Nothing, Your Honor, except —

THE COURT: Now, let me tell you what I did by way of damages. What I did was to take the salary that Mr. Eidukonis would have received from SEPTA, and I don't have those figures in front of me, \$30,238, plus certain fringe benefits, and then I deducted from those figures the amount that he actually received for the years 1985, '86, '87, and I didn't do '88. And then that gave me a certain figure.

Then I added in the things that he got from Blue Cross, dental benefits, life insurance and the other

matters that he mentioned. He had totaled those figures and his total didn't equal my total. The total that I got from doing all of this didn't equal the total that you had, Mr. Bauer, and it didn't equal the total that you had, Mr. Krenzel.

So what I want to do is to meet with both of you and I will reserve the right to change this figure after I have had the benefit of talking with both of you off the record, and then we can come and put in on the record either today or tomorrow.

MR. KRENZEL: My only confusion is, Judge, as I understood Mr. Bauer's figure of 110,000, that was before deductions for interim earnings.

THE COURT: And that is probably the case, and that's why I want to change it.

MR. KRENZEL: Okay, Judge.

THE COURT: But let me tell you a part of my problem. I do not know what Major Eidukonis was making when he was on active duty. In other words, I have a gross figure that he earned so many dollars from January the 1st of 1985 for the year of 1985, but I don't know when that period — whether there was more than one period of active duty, I don't know whether it went beyond February — March the 15th of 1985, I don't know how much he was making by way of base pay or allowances, I don't know whether there were other periods of military duty then, and it would seem to me that it he had — for example, suppose he had five months of active duty in 1985 and suppose that he was making \$3,000 a month and he was only making \$2,000 a month at SEPTA, let's say. Well, he shouldn't be entitled to what he would have been making at SEPTA less what he would have — what he did make in the Army, because he wouldn't have been paid by SEPTA in any event if he had been on active duty in the Army.

MR. KRENZEL: I see, Judge.

THE COURT: Do you understand what I am saying? And I just don't have the figures available to me, unless they are hidden somewhere in the evidence that

I could not find, and that's what I want to talk with you and Mr. Bauer about.

What I would suggest is we take about a five minute recess and go and talk about this matter, and perhaps you can show me in the record or in the exhibits where I have this information and then I will recompute the figures that I have.

MR. KRENZEL: Very well, Judge.

(Whereupon, a recess was taken at 4:45 p.m.)

(Whereupon, the Court adjourned proceedings at 5:20 p.m.)

APPENDIX B

Kestutis EIDUKONIS

v.

**SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION**

AUTHORITY, Appellant.

No. 88-1506.

**United States Court of Appeals,
Third Circuit.**

Argued Dec. 5, 1988.

Decided May 3, 1989.

**Rehearing and Rehearing In Banc Denied
May 31, 1989.**

Employee brought action against his former employer challenging his dismissal under Veterans' Reemployment Rights Act. The United States District Court for the Eastern District of Pennsylvania, J. William Ditter, Jr., J., entered judgment in favor of employee, and employer appealed. The Court of Appeals, Sloviter, Circuit Judge, held that: (1) reasonableness standard applied in evaluating employee's request for military leave, and (2) remand was required to determine whether employer acted reasonably when it discharged employee for taking extended military leave.

Vacated and remanded.

Becker, Circuit Judge, filed dissenting opinion.

1. Armed Services 115(7)

Reasonableness standard applied in evaluating employee's request for military leave and civilian employer's response under Veterans' Reemployment Rights Act. 38 U.S.C.A. § 2024(d).

2. Armed Services 115(7)

Request of employee on military reserve status for leave to serve obligatory two-week training period is per se reasonable for purposes of Veterans' Reemployment

Rights Act; any request to serve during national emergency would be in same position. 38 U.S.C.A. § 2024(d).

3. Armed Services 115(7)

Training duty of employee on military reserve status does not have to be "required" to qualify employee for benefits of Veterans' Reemployment Rights Act. 38 U.S.C.A. § 2024(d).

4. Armed Services 115(7)

In determining whether request for leave by employee on reserve status is reasonable for purposes of Veterans' Reemployment Rights Act, it will be relevant whether leave request is for extension rather than for discrete service finite in time and complete in and of itself. 38 U.S.C.A. § 2024(d).

5. Armed Services 115(7)

In determining reasonableness of military leave request by employee on reserve status under Veterans' Reemployment Rights Act, request made as early as possible will be more reasonable than one made at last minute, and it will be relevant whether employee previously knew that leave or extension was a possibility. 38 U.S.C.A. § 2024(d).

6. Armed Services 115(7)

Employee's bad faith in requesting military leave will be relevant in determining reasonableness of leave request under Veterans' Reemployment Rights Act. 38 U.S.C.A. § 2024(d).

7. Armed Services 115(7)

Evaluation of reasonableness of employee's request for military leave under Veterans' Reemployment Rights Act must take into account legitimate needs of employer,

including special needs for particular employee requesting leave, employer's ability to find substitute to assume employee's duties, special circumstances concerning work load during particular period for which leave is requested, and extent of additional cost incurred by employer if it were to accommodate reservist's request. 38 U.S.C.A. § 2024(d).

8. Armed Services 115(7)

Relevant to reasonableness of employer's position with regard to employee's request for military leave under Veterans' Reemployment Rights Act is clarity with which employer has informed its employees of its policy on duration, repetition, timing, and notice required for leaves for Reserve duty. 38 U.S.C.A. §§ 2021(b)(3), 2024(d).

9. Armed Services 115(7)

Although employer must make reasonable accommodations to permit its employees to take leave for voluntary Reserve duty, it need not accede to every leave request, particularly where request would require employee to be absent from work for extended period of time, during periods of employer's acute need, or when, in light of prior leaves, requested leave is cumulatively burdensome. 38 U.S.C.A. § 2024(d).

10. Armed Services 122(1)

Remand was required to determine whether employer acted reasonably for purposes of Veterans' Reemployment Rights Act when it discharged employee for taking extended military leave. 38 U.S.C.A. § 2024(d).

— — — — —

Saul H. Krenzel (argued), Philadelphia, Pa., for appellant.

Robert G. Bauer (argued), Abraham, Pressman & Bauer, P.C., Philadelphia, Pa., for appellee.

Before SLOVITER and BECKER, Circuit Judges
and BARRY, District Judge.*

OPINION OF THE COURT

SLOVITER, Circuit Judge.

In 1986, Congress reaffirmed the integral role that the National Guard and Reserve forces of the United States play in the total force policy of the United States for national defense. *See* Reaffirmation of Recognition of National Guard and Reserve Forces, Pub.L. No. 99-290, § 1(a)(1), 100 Stat. 413 (1986) (reenacting the almost identical 1982 statute, Recognition of National Guard and Reserve Forces, Pub.L. No. 97-252, Title XI, § 1130, 96 Stat. 759 (1982)). Congress stated that, "the citizen-military volunteers who serve the Nation as members of the National Guard and Reserve . . . require and deserve the support and cooperation of their civilian employers, in order to be fully ready to respond to national emergencies." Pub.L. No. 99-290, § 1(b), 100 Stat. 413 (1986). Congress called upon the nation's employers and supervisors for their support in maintaining a strong Guard and Reserve force by "granting employees a leave of absence from their jobs to participate in military training without detriment to earned vacation time, promotions, and job benefits." *Id.* at § 1(a)(3).

The specific provisions governing an employee's rights to be absent from work to fulfill military Reserve obligations and the employer's obligations with respect thereto are contained in the Veterans' Reemployment Rights Act, 38 U.S.C. § 2021 *et seq.* (1982 & Supp.1986). On this appeal, we must decide the standard under which an employee's request for leave from work to carry out an active-duty assignment in the Reserve services should be evaluated. This question is one of first impression for this court.

* Hon. Maryanne Trump Barry, United States District Court for the District of New Jersey, sitting by designation.

I.

Kestutis Eidukonis was hired in 1981 as a Production Control Specialist for the Southeastern Pennsylvania Transportation Authority (SEPTA). In 1984, which is the period relevant to this case, there were two other persons in comparable jobs in the department in which Eidukonis worked, all supervised by Ollin Boyd. One of Eidukonis' principal duties was to work on the budget for SEPTA's rail equipment maintenance division.

At the time he was hired, Eidukonis disclosed that he was a member of the United States Army Reserve (Reserve). Eidukonis held the rank of major in that service. As a reservist, Eidukonis had the obligation to attend two weeks of annual training, which he served at Fort Monroe, Virginia. Reservists in Eidukonis' situation must be willing to serve beyond that period but are free to turn down any particular duty offered in the absence of a national emergency without adversely affecting their status in the Reserve as long as they accumulate the 50 "points" a year required to maintain active status in the Reserve.¹

One week after Eidukonis joined SEPTA, he left for five months of military leave, beginning a pattern of prolonged absences from work for military duty. The district court found that he was on military leave for 153 days in 1981, 144 days in 1982, 88 days in 1983, and 180 days from 1984 through the first two months of 1985. During this period, SEPTA had no written employment policy limiting employees' rights to take military leave or defining the manner in which requests should be made or the amount of prior notice required. In each instance, Eidukonis informed his supervisor orally that he planned to take military leave and then confirmed the

1. Fifteen of these points are awarded automatically, and the other 35 can be obtained by taking part in the two weeks of annual service and correspondence courses or other activities. Points in excess of the 50 required cannot be carried over into a new year, but do increase a reservist's pension benefits.

dates he would be absent in writing. Prior to 1984, Eidukonis' requests were routinely granted without objection or criticism of them.

In 1984, Boyd asked all employees in his department to postpone their summer vacations until completion of a planned move of the department to another location. Eidukonis told Boyd he planned to take his two-week annual Reserve training duty that August, and that he would only take two weeks that year. On the last day of the two-week period, which Eidukonis served at Fort Monroe, he called Boyd and asked to take a week of vacation, which Boyd also approved. Before he went on the two-week tour, Eidukonis had received an offer to come to Fort Indiantown Gap, Pennsylvania, for 26 days to work on a computer project involving the design of a program for the weapons firing ranges at that site. On the last day of his vacation, Eidukonis called Boyd and requested and received permission from Boyd for the 26-day leave. Eidukonis was back at work at SEPTA for one day in September before he left again for the 26 days.

The range control program was not finished within the 26-day period, and the Army extended Eidukonis' tour of duty for an additional 140 days, from October 1, 1984 to February 16, 1985, so that he could complete the project. Eidukonis telephoned Boyd the day after the orders were issued, giving SEPTA three days' notice of the extension, and again received Boyd's consent to the extension. Because of the length of that tour of duty, Eidukonis received Army authorization to move his dependents and household goods to his station. Eidukonis testified that he saw the opportunity to save a little money by moving out of his apartment and putting his goods in storage, which the Army paid for.

Boyd believed that he did not have authority to deny Eidukonis' request for military leave. During Eidukonis' last leave, Boyd read an article about a case in Pensacola,

Florida, where a reservist's termination from his employment was upheld.² Boyd contacted SEPTA's Human Resources Department shortly after he learned of Eidukonis' orders for the 140-day extension and asked what could be done because Boyd was in a "desperate situation" and he needed Eidukonis, who was one-third of his staff, to return. During that tour of duty, SEPTA's Deputy General Manager Wert (who was coincidentally also a major in the Reserves) contacted Eidukonis and, as Eidukonis testified, "accused [him] of abusing SEPTA by taking military leave." App. at 63. Eidukonis knew that Wert also contacted a major in the Adjutant General Corps at Fort Indiantown Gap, expressing concern over Eidukonis' frequent absences from employment due to military tour commitments.

Eidukonis was scheduled to be back at SEPTA following his 140-day leave on Monday, February 18. However, on February 8, 1985 Eidukonis telephoned Boyd and requested an additional 26-day extension of duty for completion of his computer project. He told Boyd he had also arranged for his annual two-week training subsequent to that. Although Eidukonis had mentioned to Boyd the possibility of an additional extension when he visited SEPTA on October 29, he had not told Boyd before February 8 that there was actually any military order that might require him to be in the military beyond February 18. In fact, Eidukonis knew that military orders were issued November 23, 1984, for his two-week annual training tour scheduled to begin March 18, 1985, after the proposed 26-day extension.

According to Eidukonis, on February 8 Boyd orally approved his request for additional leave, and Eidukonis thereupon signified his acceptance of the orders. The district court made no finding of an oral approval. It is undisputed that on February 11, Boyd call Eidukonis and told him his request for an extension was denied. He

2. Boyd had apparently read a report of *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir.1981).

confirmed that in a letter dated February 11, which informed Eidukonis that if he did not return to work on February 18, the first workday following his scheduled 140-day leave, Eidukonis would place his employment status with SEPTA in jeopardy. See P-16.

Eidukonis consulted with an army legal officer after receiving this letter and was told that SEPTA could not terminate his employment if he continued his military service rather than reporting to work as ordered. On the basis of this advice, Eidukonis did not report for work on February 18, but instead remained at the military base to complete the computer project. SEPTA subsequently suspended and then discharged Eidukonis for failing to follow an order of his supervisor.

The district court found that Eidukonis' termination was based solely on his failure to report back from military duty on February 18 and not on any prior military leaves, failure to provide sufficient notice, breaking of promises about seeking further military duty, or other reason. The court noted that there was evidence in the record that Eidukonis disliked Boyd and other supervisors and once stated that he was requesting additional leave because of SEPTA's failure to grant him a promotion. The court found, however, that what Eidukonis did or failed to do in notifying his supervisor of his extended duty, accepting the extension, and failing to report to work did not amount to bad faith. The court stated that its decision might have been different had Boyd previously established and communicated to Eidukonis certain terms and conditions of duration of leaves and amount of notice required. The court concluded, however, that "[u]nder all the circumstances" Eidukonis' refusal to return to work on February 18 was "not unreasonable," App. at 524, because Eidukonis was in the middle of an important military project, had consistently been granted large amounts of military leave on request without objection in the past, and had been given absolutely no warning or notice that this policy had changed.

The court thus found SEPTA in violation of the Veterans' Reemployment Rights Act, which it interpreted as requiring employers to reinstate employees after military duty unless the employees "acted unreasonably with regard to . . . taking . . . military leave." App. at 527. The court awarded Eidukonis \$83,526.29 in damages, reflecting loss of income and pension benefits, out-of-pocket medical and dental expenses and pre-judgment interest.

II.

[1] SEPTA argues that the district court erred as a matter of law in applying the reasonableness test because it failed to consider as a relevant factor the burden on SEPTA accruing from Eidukonis' latest leave request. Eidukonis, on the other hand, argues that it is inappropriate to apply a reasonableness test to a reservist's military leave and that reservists have an absolute right under 38 U.S.C. § 2024(d) to take military leave of any duration, subject only to a bad faith standard. Our standard of review for deciding the appropriate rule of law is plenary, as is our review of the district court's application of legal standards to the facts of the case. *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 103 (3d Cir.1981). We turn first to the issue of the appropriate standard to be applied to employee requests for military leave.

The Veterans' Reemployment Rights Act (the Act), also known as the Vietnam Era Veterans' Readjustment Assistance Act of 1974, was originally enacted in 1940 to assure the right of veterans of World War II to reinstatement to the jobs they held before they went on active duty. Over the years, the Act was extended to cover, *inter alia*, National Guardsmen and members of the Reserve services. See *Monroe v. Standard Oil Co.*, 452 U.S. 549, 554-56 & n. 10, 101 S.Ct. 2510, 2513-15 & n. 10, 69 L.Ed.2d 226 (1981). In its present form, there are two key provisions, codified at 38 U.S.C. § 2021(b)(3) (Supp.1986) and 38 U.S.C. § 2024(d) (1982). Section 2021(b)(3) provides that a private employer shall not

deny any person "retention in employment, or any promotion or other incident or advantage of employment because of any obligation as a member of a Reserve component of the Armed Forces." The purpose of of this provision was to "assure[] that these reservists will be entitled to the same treatment afforded their coworkers without such military obligations." H.R.Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968).

Section 2024(d) provides that an employee:

"shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such . . . duty . . . such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

This provision has its origin in legislation enacted in 1960 which was "designed to provide reemployment protection for trainees who are absent from employment for only a short period of time . . . [*i.e.*,] 2-week annual encampments, and training or instruction periods that may last for 30, 60 or 90 days." S.Rep. No. 1672, 86th Cong., 2nd Sess. (1960), *reprinted in* 1960 U.S. Code Cong. & Admin.News 3077, 3078. *See also* H.R.Rep. No. 1263, 86th Cong., 2d Sess. 6 (1960) ("those individuals on active duty training under orders which contemplate service of less than 3 months and all other training . . . for lesser periods of time are covered by this section"). Thus, although 38 U.S.C. § 2024(d) does not contain on its face any limitation of the duration of the leave of a reservist for the purpose of carrying out duty for training, it appears that Congress contemplated relatively short leaves.

The Supreme Court has also signified such an interpretation of the legislative history since it stated

that the provision "now codified at 38 U.S.C. § 2024(d), was enacted in 1960 to deal with problems faced by employees who had military training obligations lasting less than three months." *Monroe*, 452 U.S. at 555, 101 S.Ct. at 2514. The dissenting Justices in *Monroe* also construed section 2024(d) to apply "to reservists whose commitments are less than three months." *Id.* at 566-67, 101 S.Ct. at 2520 (Burger, C.J., dissenting). We do not suggest that section 2024(d) is by its terms inapplicable to reservists who take more than 90-day leaves, an argument that has not been made by SEPTA³

Eidukonis points to nothing in the legislative history of section 2024(d) to indicate that Congress contemplated that it was authorizing reservists to take leave of unlimited duration for Reserve service.⁴ That, however,

3. Section 2024(d) applies to "[a]ny employee not covered by subsection (c) of this section . . ." Section 2024(c) applies to "[a]ny member of a Reserve component . . . who is ordered to an *initial* period of active duty for training of not less than twelve consecutive weeks" (emphasis added). As explained in the legislative history, the provision now codified at section 2024(c) was enacted to provide the same protection to National Guard members as granted reservists under the Reserve Forces Act of 1955, under which reservists "would perform an initial period of active duty for training of 3 to 6 months in duration and then would participate actively in Reserve units." S.Rep. No. 1672, 86 Cong., 2d Sess. (1960), *reprinted in* 1960 U.S.Code Cong. & Admin.News 3077.

4. The Secretary of Labor has been given the statutory authority to assist persons covered by the Act in obtaining replacement to their former positions, a function s/he performs through the Office of Veterans' Reemployment Rights (OVR), 38 U.S.C. § 2025. In internal correspondence, the Associate Solicitor for Labor expressed the view that coverage under section 2024(d) was limited to leaves of 90 days or less. *See* H.R.Rep. No. 782, 97th Cong., 2d Sess. 8 (1982). Although the House of Representatives passed a bill that would have provided that employers need not grant leaves of absence of more than 365 days within every three years for members of the Reserve services, *see* 128 Cong. Rec. 23,458 (1982), this aspect of the House bill did not survive the compromise agreement between the House and Senate. The Conference Committee, however, stated that the Solicitor of Labor's policy was not well founded "either as legislative interpretation or application of

is what Eidukonis' proffered construction of section 2024 would impose. If the right to take leave would be subject only to a bad faith limitation, it would be in effect be unlimited in duration.

The district court and the two circuits to consider the issue held that the grant of a right to employees to take military leave on request in 38 U.S.C. § 2024(d) embodies an implicit requirement that the request for leave be reasonable. *See, e.g., Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1468 (11th Cir.1987); *Lee v. City of Pensacola*, 634 F.2d 886, 889 (5th Cir.1981). Application of a reasonableness standard is consistent with Congress' recent joint resolution urging the nation's employers to cooperate with the Reserve services scheme. *See* Pub.L. No. 99-290, 100 Stat. 413 (1986). An interpretation of section 2024(d) that gave employees the right to leave on demand for all, almost all, or even the substantial part of the work year without consideration of the legitimate needs of civilian employers for continuity and dependability among their workforce would be counter-productive to the spirit of the joint resolution because it could deter the hiring of members of the Reserve services. While Congress expects employers to be patriotic, we do not believe that it expects them to forego all legitimate business concerns. *See Lee*, 634 F.2d at 888 (Congress "did not intend . . . to endow a reservist with unreasonable powers over his employer or cause his employer unreasonable hardship" (quoting from district court opinion)).

Although the Act is "to be liberally construed for the benefit of the returning veteran," *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196, 100 S.Ct. 2100, 2104, 65 L.Ed.

the pertinent case law." 128 Cong.Rec. 25,513 (1982), *reprinted in* 1982 U.S.Code Cong. & Admin.News 3012, 3020. This statement, which was made long after section 2024 was passed and which did not accompany a successful amendment to the statute, is not an authoritative indication of Congress' intent. *See, e.g., United States v. United Mine Workers of Am.*, 330 U.S. 258, 281-82, 67 S.Ct. 677, 690, 91 L.Ed. 884 (1947).

2d 53 (1980), its nondiscrimination provision, section 2021(b)(3), does not grant reservists the right to preferential accommodations by their employers, *see Monroe*, 452 U.S. at 561-65, 101 S.Ct. at 2517-19 (employer need not make work-scheduling accommodations for reservists not made for other employees); *Waltermeyer v. Aluminum Co. of Am.*, 804 F.2d 821, 824-25 (3d Cir.1986) (reservists' rights must equal, not exceed, those of other employees); *see also* H.R.Rep. No. 1303, 90th Cong., 2d Sess. 3 (1968). Section 2024(d) was animated by the same congressional interest in protecting the civilian employee who serves time with the military as lay behind section 2021(b)(3). There is no reason why the legitimate interests of the employer and fellow employees should be taken into consideration in one situation but not the other. Therefore, we conclude that a standard which evaluates an employee's request for leave and the civilian employer's response on the basis of reasonableness under all of the circumstances is the appropriate one to use under 38 U.S.C. § 2024(d).

III.

The two courts of appeals which have adopted the reasonableness standard for evaluating the employee's leave request and the employer's response have differed in their view of the relevant factors to be considered. In *Lee v. City of Pensacola*, 634 F.2d 886 (5th Cir.1981), the employee, a police officer in the City of Pensacola, was also a captain in the Florida Army National Guard. He was granted leave for 59 days to attend a specialized training course and while there learned that he might, if he wished, receive an extended order to stay almost five months more for the completion of the remaining phases of the course. After receiving assurance from the military legal adviser that his civilian employment rights would continue, Lee sought permission a few days before the expiration of his original leave to remain on leave. Permission was denied and Lee was eventually dismissed. In ruling on Lee's suit seeking reinstatement, the district court found for the employer, stating that the

period for which leave of absence is given “‘must be reasonable both in the context of the reservist’s military obligation *and* the requirements of the employer.’” *Id.* at 888 (emphasis added) (quoting from district court opinion). The Fifth Circuit affirmed, noting that Lee “completely ignored the difficulties faced by the City in carrying out its important police duties.” *Id.* at 889.

In *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464 (11th Cir.1987), the employee in question was a secretary in the corporate planning department and a medic with the Army Reserve. She sought a one-year leave so that she could participate in a licensed practical nurse training program. When the employer denied the request but realized she would leave with or without its permission, it filed a declaratory judgment action. The district court held that the employee’s leave request was unreasonable and that therefore Gulf States did not violate the Act in denying the request. On appeal, the Eleventh Circuit reversed. It stated that “[t]he reservist begins with a presumption that her leave request is reasonable,” 811 F.2d at 1469, that “burden to the employer alone is not enough to mark a leave request as unreasonable,” *id.*, and that absent “questionable conduct of the employee,” akin to “bad faith”, the reasonableness test most likely will be satisfied. *Id.* at 1470.

[2] We set forth some of the factors that we believe should be considered in evaluating the reasonableness of the request for leave and the response. Because their applicability *vel non* will naturally depend on the circumstances of the particular case, they are illustrative rather than inclusive. We begin with the national importance of Reserve status. It is this factor that impelled Congress to enact section 2024(d) in the first place. It follows that a request for leave to serve the obligatory two-week training period is *per se* reasonable. Obviously, any request to serve during a national emergency would be in the same position.

[3] We also agree with *Lee* and *Gulf States* that the training duty does not have to be “required” to qualify an

employee for the benefits of section 2024(d). *See Lee*, 634 F.2d at 889; *Gulf States*, 811 F.2d at 1469. There is evidence in this case that some tours of duty are solicited by the reservists and that, with the exception of the annual training tours, the reservist can decline offers for tours made by the military. Nonetheless, we assume that the military services would not request duty from a reservist which was not in the national interest, and courts owe deference to professional military judgments concerning the training and other needs of the armed services, *see Gilligan v. Morgan*, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973). That does not mean that the inquiry should ignore the employee's option to schedule the military training or other duty at a different time. *See Lee*, 634 F.2d at 889 (other opportunities to complete the six phases of training course would have been available to employee).

[4] Both the *Lee* court and *Gulf States* court believed that the conduct of the reservist was a relevant factor in evaluating the reasonableness of the request for leave and the response. *Gulf States*, however, appeared to construe the ambit of relevant factors more narrowly, suggesting that the court was "to look for conduct akin to bad faith on the employee's part in determining reasonableness." 811 F.2d at 1469. We believe the inquiry is broader. In fact, even in *Gulf States* the court noted that "the length of time of the requested leave" was an appropriate consideration. *Id.* at 1469. In that connection, it will be relevant whether the leave requested is for an extension rather than for a discrete service finite in time and complete in and of itself.

[5] A request made as early as possible will be more reasonable than one made at the last minute. *See e.g., Burkart v. Post-Browning, Inc.*, 859 F.2d 1245 (6th Cir. 1988) (last-minute notice by employee-reservist insufficient); *Lee*, 634 F.2d at 889 (employee failed to tell employer that he was negotiating for extension of duty); *see also Sawyer v. Swift & Co.*, 836 F.2d 1257 (10th Cir.1988) (upholding termination where employee-

reservist failed to give adequate notice). It will be relevant whether the employee previously knew that a leave or an extension thereof was a possibility.

[6] Patently, an employee's bad faith or lack thereof in requesting leave will be relevant. In *Lee*, the employee failed to disclose to his employer "that he was seeking [an] extension of his training period;" he "waited until he received actual orders amending the original training orders before he communicated with [his employer];" and even after he was notified by his employer that his leave would not be extended, he failed "to discuss with his employer the opportunities which were available to him." 364 F.2d at 889. The *Gulf States* court believed these factors showed Lee's bad faith. See 811 F.2d at 1469. We need not decide whether they do because we agree that such factors are all material in evaluating the employee's conduct in determining his or her reasonableness. While it would also be relevant that the employee inquired of the military legal officer and followed the advice given, that alone is not dispositive. See *Lee*, 634 F.2d at 888 (court found Lee's conduct unreasonable although he had checked with a military legal adviser). The military may view an employee's right under section 2024(d) to be unlimited, which, as we noted above, is not our position.

[7] It is our view that reasonableness must also take into account the legitimate needs of the employer. Although we agree with *Gulf States* that "burden to the employer *alone* is not enough to mark a leave request as unreasonable," 811 F.2d at 1469 (emphasis added), see also *Monroe*, 452 U.S. at 565, 101 S.Ct. at 2519 ("employers may not rid themselves of . . . inconveniences and productivity losses by discharging . . . employee-reservists solely because of their military obligation"), we believe that such burden must be accorded more than the "nominal significance" which Eidukonis suggests, See Brief of Appellant at 30.

Relevant to the employer's needs are the special needs for the particular employee requesting leave, cf.

Lee, 634 F.2d at 889 (police officer ignored difficulties department would have in carrying out police duties in his absence); the employer's ability to find a substitute to assume the employee's duties; special circumstances concerning the work lad during the particular period for which the leave is requested; and the extent of the additional costs incurred by the employer if it were to accommodate the reservist's request. Because any leave will impose some costs on the employer, *see Monroe*, 452 U.S. at 565, 101 S.Ct. at 2519, this fact in itself is not enough to make the denial of leave reasonable.

[8, 9] Also relevant to the reasonableness of the employer's position is the clarity with which it has informed its employees of its policy on the duration, repetition, timing, and notice required for leaves for Reserve duty. The employer cannot refuse requests for military leave in such a way as to violate the nondiscrimination requirement of 38 U.S.C. 2021(b)(3), such as by denying leaves for military duty while allowing them for other purposes. In short, although an employer must make reasonable accommodations to permit its employees to take leave for voluntary Reserve duty, it need not accede to every leave request, particularly where the request would require the employee to be absent from work for an extended period of time, during periods of the employer's acute need, or when, in light of prior leaves, the requested leave is cumulatively burdensome.

IV.

[10] Each party, in effect, asks us to make our own determination as to reasonableness from the record developed by the district court. This we are unwilling to do. The balance is not so clear that one party or the other should prevail as a matter of law. There is, for example, substantial evidence in the record that Eidukonis disliked Boyd, that he failed to notify Boyd promptly of his projected military leaves and preferred instead to "play poker" (in his words), *see App.* at 224, 468a, because of his dissatisfaction with his failure to receive a promotion,

and that he was aware from West's communication directly to him and from Wert's inquiries to his superiors in the Reserves that SEPTA was unhappy with his extended leaves. In addition, Eidukonis was aware that his SEPTA department was undergoing a particularly busy period during the budget cycle, that the move to a new location strained its resources, and that it was difficult to obtain employees to substitute for him. On the other hand, Eidukonis was concededly doing significant work for the military and had never specifically been told before February 11, 1985 that his extended leaves for military duty were unacceptable to SEPTA nor been given any guidance as to SEPTA's policy. The balance to be made in this case is one for the district court in the first instance.

It is evident that the district court considered at least some of the foregoing factors in finding that it was reasonable for Eidukonis to extend his leave in the face of SEPTA's request that he return to work on February 18, 1985, but it may not have considered all. Because of the absence of any governing opinions by this court, the district court may have believed that it was not permissible for it to consider the employer's situation in evaluating reasonableness. It is also possible that the court believed that Eidukonis' conduct could be judged only in terms of whether or not he acted from bad faith. Under these circumstances, we will remand this case so that the district court can reconsider its findings and make such additional findings of fact and conclusions of law as may be necessary to accord with the test of reasonableness set forth above.⁵

5. SEPTA argues that the district court abused its discretion in refusing to hear the testimony of its expert witness who served as an ombudsman with a Department of Defense project aimed at resolving reservist-employer conflicts. SEPTA offered this witness for his testimony about typical reservist practices in requesting leave and providing notice to their employers. The district court ruled that this testimony would not be helpful to it as trier of fact since it already understood the Reserve services system, SEPTA's leave policy, and

V.

The dissent argues that we have producted and "elusive precedent" and have used an "incorrect" standard. Dissenting Typescript Op. at 4. The dissent, however, agrees that the relevant inquiry is one of "reasonableness" and that the burden on the employer can be considered. *Id.* at 6. The dissent believes that the majority opinion is "confusing on the issue of how much weight should be accorded to the employer's interests." *Id.* at 3. The difficulty in quantifying the exact weight of factors to be considered in a balancing inquiry is hardly new. In place of the majority's elucidation of factors, the dissent would substitute factors such as whether the employee acted "*highly unreasonable*" and whether he was guilty of "*questionable conduct*," *id.* at 8, inquiries which are not themselves models of quantification. It would appear, therefore, that the major substantive difference between the majority and the dissent is that the dissent would accord a "strong presumption of reasonableness" to the employee's actions, *id.* at 6, a presumption for which we find no basis in the legislative history or in the Supreme Court's decision in *Monroe*, a case in which the employee's effort to get a special preference was rejected.

VI.

For the reasons set forth above, we will vacate the district court's order and remand for further consideration in accordance with this opinion.

BECKER, Circuit Judge, dissenting.

NOTES (*Continued*)

Eidukonis' conduct in relation to it. This ruling may have been affected by the court's understanding of the reasonableness test as more limited than that developed here. On remand, the court may wish to reconsider the helpfulness of the proffered testimony in light of the established in this opinion. We express no opinion on its ruling, which is one committed to its sound discretion.

I readily concede that Mr. Eidukonis is not a sympathetic plaintiff. I nonetheless find myself unable to join in the majority opinion.

The result of this appeal depends on the legal standard applied. I believe that the language of 38 U.S.C. § 2204(d) and the Supreme Court's interpretation of a similar provision compel the adoption of an approach akin to the one adopted in *Gulf States Paper Corp. v. Ingram*, 811 F.2d 1464, 1468 (11th Cir.1987) — an approach that looks solely to the reasonableness of the employee's action and accords it a strong presumption of reasonableness. See 811 F.2d at 1468. Applying a modified *Gulf States* principle, which is more favorable to the reservist than that adopted by the majority, see *infra*, I would affirm. I do not think that the standards espoused in *Gulf States* and *Lee v. City of Pensacola*, 634 F.2d 886, 889 (5th Cir.1981), can be reconciled in the way that the majority has attempted, and, more important, I think that the *Lee* — *Gulf States* combination formula derived by the majority is not only legally incorrect but will be difficult for district courts to apply.

It is important to note that if SEPTA had established clear and reasonable leave policies, which Mr. Eidukonis violated, or if the district court had found that the pattern of absences had been the cause of his discharge, rather than finding that “[p]laintiff was terminated by SEPTA solely because of his failure to report back from military duty on February 18, 1985,” Dist.Ct.Op. at 7 (May 17, 1988), Mr. Eidukonis might have failed even my more generous standard. Faced with the present record, however, I see no alternative but to uphold the judgment of the district court.

I.

The majority attempts to reconcile the *Lee* and *Gulf States* cases as both adopting a “reasonableness” standard. I do not believe that they can be so reconciled. The Fifth Circuit's approach in *Lee* is not completely clear, but it seems to involve an inquiry into the totality of the

circumstances—to ascertain whether the reservist-employee's leave request was reasonable. See *Bottger v. Doss Aeronautical Services, Inc.*, 609 F.Supp. 583, 585 (M.D. Ala. 1985) (describing *Lee* as adopting a "totality of the circumstances" test). In *Lee* the Court reasoned that in enacting 38 U.S.C. § 2024(d) (1982), Congress could not have intended "to permit employees who have been granted military leave to remain on such leave unnecessarily and at their own convenience to the detriment of the legitimate concerns of their employers." 634 F.2d at 889 (quoting district court's opinion). With this in mind, the *Lee* court looked at the length of the leave, the amount of notice *Lee* gave his employer, whether *Lee* could have scheduled his training at other times, and the burden that *Lee*'s absence caused his employer. *Id.*

In *Gulf States*, the Eleventh Circuit, although purporting to apply *Lee*, titled the *Lee* standard more in favor of the reservist-employee. See 811 F.2d at 1468-70. Under the *Gulf States* standard the court must "look for conduct akin to bad faith on the employee's part in determining reasonableness." *Id.* at 1469. *Gulf States* further held that the employee's actions should be accorded a "presumption of reasonableness." And it noted that a "burden to the employer alone is not enough to mark a leave request as unreasonable." *Id.* There must also be "questionable conduct on the part of the employee." *Id.* at 1470.

Though it adopts essentially the same factors to assess reasonableness which the *Gulf States* court did, see Maj. Op. at 697, the majority here expressly rejects the "akin to bad faith" approach of *Gulf States*. See Maj. Op. at 697. Although the majority holds that courts should consider "the legitimate needs of the employer," in addition to the *Gulf States* factors, *id.* at 697, its opinion is, I believe, somewhat confusing on the issue of how much weight should be accorded to the employer's interests. The majority adopts the language from *Gulf States* that burden on the employer alone is not enough

to justify dismissal, but, unlike *Gulf States*, does not specify what extra factor is needed to establish unreasonableness. The majority has thus adopted a totality of the circumstances standard, but has given the district courts little guidance on how to assess the relevant information. Moreover, it has not made clear whether the reasonableness should be presumed or whether the reservist has the burden of establishing it.

In sum, I believe that the majority's effort to reconcile *Lee* and *Gulf States* has produced an elusive precedent which will be difficult to apply and which will make it impossible for reservists and their lawyers to predict with any degree of certainty how they will fare under any given set of circumstances.

II.

More significantly, I believe that the standard espoused by the majority is incorrect because it does not protect the reemployment rights of reservists to the degree required by Congress. Title 38 U.S.C. § 2024(d) is written broadly, mandating that leave for reserve duties "shall upon request be granted," and that reservists "shall be permitted to return to [the] position[s] [that they] would have had if [they] had not been absent for such purposes." Furthermore, the Supreme Court, in construing a similarly provision of the statute, 38 U.S.C. § 2021(b)(3) (1982 & Supp. IV 1986), stated that "[t]his Court does not sit to draw the most appropriate balance between benefits to employee-reservists and costs to employers. that is the responsibility of Congress." *Monroe v. Standard Oil Co.*, 452 U.S. 549, 565, 101 S.Ct. 2510, 2519, 69 L.Ed.2d 226 (1981). In *Monroe*, the Supreme Court noted that

[t]he frequent absences from work of an employee-reservist may affect productivity and cause considerable inconvenience to an employer who must find alternative means to get necessary work done. Yet Congress has provided in § 2021(b)(3) that employers may not rid themselves of such inconveniences

and productivity by discharging . . . employee-reservists solely because of their military obligations.

Id. Similarly, in enacting § 2023(d), Congress has provided that employers may not rid themselves of the burden of having employees who are members of the Army Reserve by refusing to reinstate them after their leave.¹

Despite this background, I agree with the majority that the right of reservists to take military leave should not be absolute. *See* Maj. Op. at 695. It is true that we generally bow to the plain meaning of a statute. *See Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 24-26, 97 S.Ct. 926, 940-42, 51 L.Ed2d 124 (1977). However, it has long been a maxim of statutory construction that “[g]eneral terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.” *Government of Virgin Islands v. Berry*, 604 F.2d 221, 225 (3d Cir. 1979) (quoting *United States v. Kirby*, 74 U.S. (7 Wall.) 482, 486-87, 19 L.Ed. 278 (1968)). Were we to read § 2024(d) as creating an absolute right of reinstatement, reservists would be allowed to play fast and loose with the system in a way that Congress could not have intended. However, given the considerable breadth of the right accorded to reservists by the literal terms of the statute, and the Supreme Court’s pronouncement

1. The legislative history of § 2024(d) is not particularly helpful in determining what standard we should adopt. As the majority points out, there are some references in the history to the fact that when deliberating about the statute, Congress was primarily thinking about military leaves of less than 90 days. *See* Maj. Op. at 693. But the majority itself concedes that these references are not dispositive, and there is no clear indication of congressional opinion with respect to the question of how great a burden employers should be required to bear. The legislative history simply does not discuss the possibility or contours of a “reasonableness test.”

that the balance between the employer and the employee is for Congress to strike, I would create only a very narrow exception to the reservists' general right to be reinstated after military leave.

More precisely, I would adopt a standard much like the one adopted by the Eleventh Circuit in *Gulf States*. I would hold that the relevant inquiry is whether the employee's actions have been reasonable, and I would accord a strong presumption of reasonableness to them. An employer could rebut this presumption only by presenting evidence that the employee acted highly unreasonably. I use a "highly unreasonable" standard rather than the "akin to bad faith" standard articulated in *Gulf States* for two reasons. First, I find the term "akin" to be somewhat confusing in this context. Second, I think that adopting a "bad faith" formulation may put too much of a burden on employers by requiring them to offer proof about the mental state of the reservist.

The burden on the employer is not wholly irrelevant to this inquiry, but I agree with the Eleventh Circuit that a court should consider whether the leave has caused hardship to the employer only if the reservist has engaged in "questionable conduct." *Gulf States*, 811 F.2d at 1470. For example, a reservist's failure to notify his employer as soon as practicable that he would be taking leave could be a questionable act, as could an employee's violation without good cause of an employer's established reasonable leave policy. Such instances, if they are sufficiently egregious, may be in and of themselves highly unreasonable. Alternatively, they may be considered highly unreasonable even if they are somewhat less egregious, if the employee was aware that they would cause significant hardship to the employer.

III.

I accept the facts as described by the majority, which, as I have observed, do not paint a sympathetic picture of Mr. Eidukonis. What is legally significant,

however, under the standard I would apply is the district court's finding that Mr. Eidukonis

was terminated by SEPTA solely because of his failure to report back from military duty on February 18, 1985, and not because of any previous military leaves, not because he took those military leaves, not because of when he took the military leave that was — that ended on February 16, 1985, not because of notices given concerning those leaves, not because of the number of his prior military leaves, not because of the length of his military service . . . and not because he broke any promises about seeking military duty.

Dist. Ct. Op. at 7. This factual finding is not clearly erroneous. Indeed, it is supported by statements made by SEPTA's representatives at trial. *See* Trial Trans. at 86-97 (May 3, 1988).

In light of this finding, the only relevant issue is whether Mr. Eidukonis acted highly unreasonably in failing to report to work at SEPTA on February 18, 1985. I believe that he did not. Mr. Eidukonis notified SEPTA "within three days of learning that [the extension] had been approved" that he would be extending his leave. Dist. Ct. Op. at 8. He was in the midst of an important computer project, about which he had developed special expertise. *See Id.* And SEPTA did not notify him that there were limits on the amount of leave a reservist could take, or give him any warnings that he could be fired because of his leave, until after his orders had been issued, and only one week before his February 18 assignment was to begin. I believe that under these circumstances, Eidukonis's failure to return to work on February 18 did not constitute questionable conduct. Consequently, I would not consider the burden that his absence placed on SEPTA.

This might have been a different case if the district court had found that Mr. Eidukonis was fired because of his pattern of leave-taking. That pattern viewed as a whole may well have been unreasonable even under the

standard that I propose. But the district court made no such finding. Similarly, this might have been a different case if SEPTA had articulated clear and reasonable policies regarding military leave, and Mr. Eidukonis had willfully violated them. Again, that is not this case. On the record before us, I would affirm the judgment of the district court. I respectfully dissent.

APPENDIX C

Kestutis EIDUKONIS

v.

**SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,**

Civ. A. No. 86-5142.

United States District Court,

E.D. Pennsylvania.

Feb. 27, 1991.

Public employee brought action against former employer challenging his dismissal under Veteran's Reemployment Rights Act. The District Court for the Eastern District of Pennsylvania, entered judgment in favor of public employee. Public employer appealed. The Court of Appeals, Sloviter, Circuit Judge, 873 F.2d 688, vacated and remanded. The District Court, Ditter, J., held that: (1) public employee acted in good faith in requesting additional military leave, and (2) public employer acted in bad faith when it changed its leave policy as applied to public employee without warning and thereafter dismissed him.

Judgment for plaintiff.

1. Armed Services 115(7)

Conduct of public employee on military reserve status in requesting extension of leave for active duty so that he could complete work on special computer project was not per se reasonable under Veteran's Reemployment Rights Act where employee was not serving during emergency nor was he participating in his annual two-week training period. 38 U.S.C.A. § 2021 et seq.

2. Armed Services 115(7)

Under Veteran's Reemployment Rights Act, public employee acted in good faith in requesting additional military leave for 26 days to complete military project where employee was performing important work for the

Army and he notified public employer within three days of Army's approval of his orders. 38 U.S.C.A. § 2021 et seq.

3. Armed Services 122(6)

Public employer acted in bad faith under Veteran's Reemployment Rights Act when it changed its military leave policy as applied to employee without warning and thereafter dismissed him after he had requested additional military leave for 26 days to complete important military project and, thus, public employee was entitled to recover for lost wages and losses incident to employment; despite knowing public employer's general policy concerning reserve duty and employee's previous experience under the policy, supervisor fired employee for not complying with seven-day notice to return to work, and firing employee did not solve immediate problems his additional leave would have caused. 38 U.S.C.A. § 2021 et seq.

Robert G. Bauer, Philadelphia, Pa., for plaintiff.

Saul H. Krenzel, Philadelphia, Pa., for defendant.

MEMORANDUM AND ORDER

DITTER, District Judge.

In this matter, plaintiff sued Southeastern Pennsylvania Transportation Authority after being dismissed as a production control specialist. Plaintiff claimed defendant violated the Veteran's Reemployment Rights Act, 38 U.S.C. § 2021 et seq., and after a four day bench trial, I found in his favor.

On appeal, the Third Circuit remanded with guidelines for analyzing plaintiff's dismissal, 873 F.2d 688. This memorandum and order decides the case in accordance with those instructions.

1. FACTS

A. *The Original Facts.*

After the trial of this matter, I made the following findings of fact:

1. Plaintiff, Kestutis Eidukonis, is an adult male residing at 248 East Broad Street, East Stroudsburg, Pennsylvania.

2. Defendant, Southeastern Pennsylvania Transportation Authority (SEPTA), is a duly organized corporate authority which maintains an office at 1515 Market Street, Philadelphia, Pennsylvania.

3. Plaintiff started employment with SEPTA as a production control specialist on April 20th, 1981.

4. At the time he applied for his position at SEPTA, plaintiff stated on his application for employment that he was a member of the United States Army Reserve.

5. At all times relevant to this case, plaintiff was a major in the United States Army Reserve.

6. To maintain active status in the Army Reserve, a reservist must accumulate 50 points in one year. Fifteen points are automatic for maintaining an active status. The other 35 points can be obtained by going on two-weeks annual training [duty], taking correspondence courses, and by attending drills.

7. Any points obtained in excess of 50 points cannot be applied by a reservist to another year. Additional points accumulated on one year are, however, factored into the reservist's pension benefits.

8. A reservist must express willingness to accept military duty which exceeds two weeks. A refusal to take training beyond the two-week annual training in theory will not adversely affect a reservist's status. However, in practice, a variety of assignments and experiences may enhance the potential for promotion.

9. SEPTA provided to its supervisory, administrative, or management employees a handbook which set forth the company's employment policies, including those pertaining to military leave.

10. Prior to February 5, 1985, SEPTA had no written employment policy which limited the right of an employee to take leave for the performance of military duty.

11. While employed at SEPTA, plaintiff was granted military leaves so that he could go on military duty as follows: In 1981, from April 24th to September the 26th, 153 days; in 1982, from April 21st to September the 13th, 144 days; in 1983, from June 10th to July 11th, 32 days; from July 31st to August 26th, 27 days; from October 3rd to October 31st, 29 days, a total of 88 days. In 1984, and 1985, from August the 13th of 1984 to August the 26th of 1984, 14 days; from September the 5th of 1984 to September the 30th of 1984, 26 days; from October the 1st of 1984 to February the 17th of 1985, 140 days.

12. In each instance, SEPTA consented to plaintiff's taking employment leave so that he could perform military duty with the Army Reserve.

13. In each instance, plaintiff notified his supervisor orally of his plans for military service and later confirmed these periods of absence from employment in writing.

14. In 1984, the department in which Mr. Eidukonis worked at SEPTA was burdened because it was being moved from one location to another. Accordingly, Mr. Eidukonis' supervisor, Ollin Boyd, stated that all individuals should postpone their vacation plans until the summer of 1984 so that there would be no conflict with the moving of the department.

15. In the spring of 1984, Mr. Eidukonis discussed his two-weeks annual training duty with Mr. Boyd stating it was planned for August. Mr. Eidukonis also stated that he would not be taking additional time for military training that year beyond the two weeks in August.

16. Plaintiff's military service from September 5th to September 30th, 1984, was performed at Fort Indian-town Gap. During this tour of active duty, plaintiff was

assigned the task of preparing a computerized schedule for the weapons' firing ranges at Fort Indiantown Gap. This program involved the efficient use of training facilities and the safety of military personnel. It involved obtaining the necessary hardware and creating the necessary computer programs.

17. Plaintiff's tour at Fort Indiantown Gap was extended from October 1st, 1984, to February 16th, 1985, so that he could continue the work on the firing-range scheduling program.

18. SEPTA consented to plaintiff's military leave from August 13 to August 26, 1984, his vacation of one week, which followed, his military duties from September 5 to September 30, 1984, and his military duties from October 1st, 1984, to February 17th, 1985.

19. In notifying SEPTA of his periods of military duty, plaintiff followed the same procedure that he had followed as to previous requests for duty or extensions; that is, he notified his supervisor of the periods of active duty and followed up oral notification in writing.

20. No one at SEPTA, either orally or in writing, advised plaintiff of any objection to any period of leave, the time of year he took that leave, the manner in which his requests for military leave were submitted, or the amount of notice given to SEPTA of the requests for military leave.

21. In November, 1984, defendant's attorney, Vincent Walsh, called Fort Indiantown Gap and asked whether plaintiff was in fact on military duty there. Plaintiff was informed of this call by Major Dennis Olgin who had received it. Thereafter, Mr. Walsh wrote a follow-up letter to the military authorities at Indiantown Gap making a similar request for information and plaintiff knew of that letter.

22. On October 29, 1984, plaintiff informed his immediate supervisor, Ollin Boyd, that his 140 day period of active duty with the Army might be extended. He told Boyd that he was doing vital work for the Army

and that he was the only one that the Army felt was competent to be placed in such a critical position.

23. On February 5, 1985, the Army approved a request from Fort Indiantown Gap that plaintiff's period of active duty be extended for 26 days so that he could complete his firing range scheduling assignment.

24. On February 8, 1985, plaintiff told his immediate supervisor, Ollin Boyd, of the fact, that his period of military service was being extended.

25. By letter dated February 11, 1985, Mr. Boyd advised plaintiff that if he did not return to work at SEPTA on February 18, 1985, his employment status at SEPTA would be placed in jeopardy.

26. February 18, 1985, was the first SEPTA work-day following plaintiff's completion of the tour of active duty that started October 1, 1984.

27. Plaintiff did not report for work on February 18, 1985, at SEPTA, but remained at Fort Indiantown Gap where he was still on military duty as a result of the 26-days extension of the period of service that had been scheduled to terminate on February 16, 1985.

28. Plaintiff was terminated by SEPTA solely because of his failure to report back from military duty on February 18, 1985, and not because of any previous military leaves, not because of when he took those military leaves, not because of when he took the military leave that ended February 16, 1985, not because of notices given concerning those leaves, not because of the length of his military services, not because of his job performance, not because he had made derogatory comments about SEPTA supervisors, not because of his desire for a transfer, and not because he broke any promises about seeking military duty.

29. Plaintiff's tour of duty at Fort Indiantown Gap was extended and re-extended on September 5, 1984, until March 15, 1985.

30. By orders dated November 23rd, 1984, plaintiff was ordered to active duty for training at Fort Monroe, Virginia, to commence March 18, 1985. Plaintiff did not

inform his supervisor, Ollin Boyd, until February 8, 1985, of the orders for his active duty for training at Fort Monroe, Virginia.

31. When plaintiff was told by Ollin Boyd to report to work on February 18, 1985, or that his continued employment status at SEPTA would be in jeopardy, plaintiff consulted the legal officer at Fort Indiantown Gap, Major Dennis Olgin. Major Olgin advised plaintiff that SEPTA could not terminate him because of his continued military duty and his failure to report for work on February 18, 1985.

32. Plaintiff acted reasonably and in good faith in notifying Mr. Boyd in October 1984, that his period of active duty might be extended; in notifying Mr. Boyd of that extension within three days of learning that it had been approved; and in accepting the extension and completing an important assignment at Fort Indiantown Gap.

34. Under all the circumstances, plaintiff was not guilty of any bad faith towards SEPTA.

35. Under all the circumstances, plaintiff's refusal to return to work on February 18, 1985, was not unreasonable.

36. Under all the circumstances, it was unlawful for defendant to terminate plaintiff's services as its employee.

37. Plaintiff is entitled to recover money damages.

B. Additional findings of fact made necessary by the appellate decision.

Following the Third Circuit's remand, I gave both parties the opportunity to offer additional evidence. Neither did so although each submitted additional proposed findings of fact and conclusions of law. The Court of Appeals directed me to apply a reasonableness standard to the conduct of both plaintiff and defendant, taking into account their respective concerns. I therefore make the following additional.

FINDINGS OF FACT

38. There were only three resource controllers including Mr. Eidukonis at SEPTA during the relevant period.

39. The move to a new building in June of 1984 created logistical problems in the summer of 1984 in the resource controllers' department.

40. At the time of the move, SEPTA increased the resource controllers' responsibility.

41. Both the move and the additional responsibility significantly increased the department's workload.

42. February is a particularly busy period for SEPTA resource controllers. The poor weather increases the need to order materials, and the budget and inventory preparation increases the work load appreciably.

43. SEPTA did not hire another employee to fill in for Mr. Eidukonis, and his temporary replacements were unable to do a satisfactory job.

44. The move, the increased responsibilities, and the general winter work load problems combined during February, 1985, to create particularly acute burdens on the resource controller's department.

45. Mr. Eidukonis was a skilled employee who was especially knowledgeable about the department's financial duties and his presence would have alleviated much of the department's budgetary burden.

46. Mr. Eidukonis knew about the difficulties his department faced in February, 1985.

47. Plaintiff wanted to extend military leave that would have lasted for 166 days by an additional 26 days.

48. Plaintiff's request for the additional 26 days was made promptly.

49. Prior to February 11, 1985, SEPTA's military leave policy so far as it concerned Mr. Eidukonis was to grant his requests.

50. SEPTA did not ask plaintiff to try to schedule his leave for some other time.

51. SEPTA needed plaintiff's services but had not made any significant effort to find a substitute to do his work while he was on military duty.

52. During the 26-day period that Mr. Eidukonis would have been absent had his request for leave been granted, there was no particular project, activity, or job which only Mr. Eidukonis could perform.

53. There was no evidence that firing Mr. Eidukonis solved any of SEPTA's problems that existed in or arose during the 26-day period beginning February 18, 1985.

54. There was no evidence of any attempt on SEPTA's part to obtain Mr. Eidukonis' cooperation in solving SEPTA's problems that would be caused by the extension of his military leave for 26 days.

II. DISCUSSION

On appeal, the Third Circuit held the Veteran's Reemployment Rights Act, 36 U.S.C. § 2021 et seq., protects Mr. Eidukonis. In addition, the Third Circuit held that to enjoy the Act's protection, Mr. Eidukonis must have acted reasonably under all the circumstances.

In explaining the reasonableness standard, the Third Circuit identified various factors by which to judge reasonable conduct: (1) the nature of the employee's military obligation; (2) the employee's ability to schedule the leave at another time; (3) the length of the requested leave; (4) whether the employee's request was to extend a current leave, or for a discrete term; (5) the promptness of the request; (6) the employee's good faith; and (7) advice given by a military legal officer.

Second, the Third Circuit identified certain employer concerns that bear on reasonableness: (1) the employer's legitimate needs; (2) the employer's need for the particular employee and its ability to find a substitute; (3) the work load during the leave period; (4) the extra cost of accommodating the leave; and (5) the clarity of the company's policy regarding reserve leaves.

The Court of Appeals noted these factors were illustrative, not exhaustive.

A. Factors Relating to Mr. Eidukonis' Behavior

[1,2] At the outset, I note Mr. Eidukonis was not serving during an emergency, nor was he participating in his annual two week training period. As a result, his conduct was not *per se* reasonable, and I must balance the appropriate factors to determine reasonableness.

Mr. Eidukonis sought to extend his leave from SEPTA beyond February 17 so he could complete work on a special computer project for the Fort Indiantown Gap firing range. At trial, Major Stout (the officer in charge of the firing range) described the importance of controlling the range's scheduling problems. He also indicated the base was trying to solve them before the impending and annual summer-through-fall range overcrowding. Finally, there was testimony that replacing Mr. Eidukonis would have created delays because he was the only person well acquainted with the project.

Unquestionable, Mr. Eidukonis was performing important work for the Army. The next question is whether it was possible to delay the 26-day extension to a time that would have been more compatible with SEPTA's needs. There was no suggestion that SEPTA considered such a possibility much less that Mr. Boyd sought to explore it with either Mr. Eidukonis or the Army. Therefore, I conclude Mr. Eidukonis could not reasonably have been expected to reschedule this duty in view of the program's status, his integral role, the need for prompt completion the absence of any statement from SEPTA or a particular need of equal importance, or a request from SEPTA that the Army accommodate SEPTA's immediate needs.

As to the timing of his request: Mr. Eidukonis notified SEPTA within three days of the army's approval of his orders. In the past, he was not as prompt. Mr. Eidukonis even admitted to "playing poker" at times by

not revealing his plans promptly. In every previous case, though, SEPTA allowed Mr. Eidukonis to serve without ever commenting his notice was insufficient. Under the circumstances, In find Mr. Eidukonis provided sufficient notice on February 8 of his leave request.

Finally, there is the issue of Mr. Eidukonis' good faith. On other occasions, Mr. Eidukonis could have been more forthright with SEPTA. In fact, SEPTA has argued persuasively that Mr. Eidukonis was not candid because of his dislike for SEPTA, and his superiors (particularly Ollin Boyd), his anger over not being transferred to another department, and his ability to make more money as a reservist. All these things may have been true about the past, but Mr. Boyd said they had nothing to do with is firing Mr. Eidukonis. The fact that Mr. Eidukonis had been told by a legal officer at the base that SEPTA could not discharge him for failing to report on February 18 is further evidence of plaintiff's good faith behavior.

B. Factors Relating to SEPTA

[3] Mr. Eidukonis was undoubtedly an important member of his department. Because only three people shared the work, his absence placed a great deal of pressure on his compatriots. Nonetheless, SEPTA did not hire another resource controller and Mr. Boyd knew its temporary replacements were grossly inadequate. During Mr. Eidukonis' duty at Fort Indiantown Gap, his SEPTA department was especially busy because of the time of year (the budget and inventory were due), new work arrangements (the department had been given more responsibility), and the recent move to a new building.

SEPTA had a legitimate need for plaintiff's services, and he was aware of it. At the same time, though, SEPTA had consistently followed a clear policy for every reserve assignment Mr. Eidukonis ever took. The SEPTA rules do not restrict an employee's right to serve

in the military reserves, and they do not restrict the length or timing of service. In every year that Mr. Eidukonis worked at SEPTA, he took extended military leave, and the company never objected. Despite knowing SEPTA's general policy concerning reserve duty and Mr. Eidukonis's previous experience under that policy, Mr. Boyd fired Mr. Eidukonis for not complying with the seven-day notice to return to work

Another factor relating to SEPTA must be considered: did firing Mr. Eidukonis solve the immediate problems his additional leave would have caused? Neither party presented evidence on this question so we do not know how long it took SEPTA to hire a replacement for Mr. Eidukonis, provide the necessary training, integrate that person into the work system, and conclude the person was satisfactory. In the absence of evidence to the contrary, experience suggests this process would have exceeded the 26 days Mr. Eidukonis would have taken to finish the Army project. From SEPTA's inability to provide a ready substitute on other occasions when Mr. Eidukonis was on reserve duty, I conclude that firing Eidukonis did not overcome SEPTA's immediate difficulties unspecified and ill-defined as they were, but only made them worse. Whether firing him solved SEPTA's long-range problems I do not know, but I do know SEPTA made no effort to enlist Eidukonis' cooperation with regard to those long range problems.

As I noted in my original findings, had SEPTA given Mr. Eidukonis a warning that he needed to change his behavior, reduce his military service, and give more notice, this might be a different case. None of these warnings occurred, though.

For all these reasons, I again conclude Mr. Eidukonis did not act in bad faith when he requested the 26-day extension to finish the firing range project at Fort Indiantown Gap. SEPTA established, at least so far as Mr. Eidukonis was concerned, a clear company policy to approve his leave requests. There was no suggestion that SEPTA presented any alternative to immediate

return and none that firing Mr. Eidukonis solved SEPTA's problems. Under all the circumstances, I conclude that while Mr. Eidukonis acted in good faith, SEPTA did not. As a result, I find that SEPTA violated the Veterans' Reemployment Rights Act, 38 U.S.C. § 2021 *et seq.*, when it terminated Mr. Eidukonis' employment¹

I previously reached the following conclusions of law.

1. The court has jurisdiction over the parties and the subject matter of this action.

2. Defendant violated the Veterans' Reemployment Rights act, 38 United States Code, Section 2021, *et cetera*, when it terminated plaintiff's employment on April 13, 1985.

3. Under the terms of the Act, SEPTA was required to reinstate plaintiff to his position of employment unless he acted unreasonably with regard to his taking of military leave.

4. Under all the circumstances, plaintiff did not act unreasonably with regard to the period of military leave from February 18 through March 15, 1985.

5. Defendant is liable to plaintiff for his lost wages and for losses incident to his employment, as follows:

(a) For loss of income, \$60,224.06 plus prejudgment interest at the rate of six percent, compounded annually, \$4,266.28, or a total of \$64,490.34. As to pre-judgment interest generally, *see Poletto v. Consolidated Rail Corp.*, 826 F.2d 1270, 1274 (3d Cir. 1987).

1. As a final note, the Court of Appeals directed that I consider whether SEPTA could present an expert witness to discuss employment problems between reservists and employers. There is no need for me to do so since SEPTA decided it would not or could not offer that witness.

(b) For out-of-pocket medical and dental expenses, \$14,007. plus interest at the rate of six percent, compounded annually, 1002.87, a total of \$15,009.87.

For loss of pension benefits, \$4,026.08.

Those conclusions remain unchanged and to supplement them, I now reach the following additional:

CONCLUSIONS OF LAW

6. Plaintiff acted in good faith in requesting additional military leave for 26 days to complete an important military project.

7. SEPTA acted in bad faith by changing its military leave policy as it applied to plaintiff without warning and by discharging him.

8. Plaintiff is entitled to the money damages set forth in the order of June 2, 1988, plus legal interest from that date.

ORDER

AND NOW, this 27th day of February, 1991, it is hereby ordered that judgment be entered in favor of the plaintiff, Kestutis Eidukonis, and against the defendant, Southeastern Pennsylvania Transportation Authority, in the sum of \$83,526.29, plus interest, as provided by 28 U.S.C. § 1961, computed from June 2, 1988.

APPENDIX D

RECEIVED AND FILED

August 12, 1991

SALLY MRVOS Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1210

KESTUTIS EIDUKONIS,

Appellee

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,

Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

D.C. Civil Action No 86-05142

District Judge: Hon. J. William Ditter, Jr.

Submitted Under Third Circuit Rule 12(6)

August 9, 1991

Before: MANSMANN, ALITO, *Circuit Judges* and
NEALON, *District Judge**

JUDGMENT ORDER

* Hon. William J. Nealon, United States District Judge for the Middle District of Pennsylvania, sitting by designation.

After consideration of all contentions raised by appellants, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed. Costs taxed against appellant.

BY THE COURT,

S. L. A. A. L. (

Circuit Judge

ATTEST:

Sally Mryos
Sally Mryos, Clerk

DATED: August 12, 1991

APPENDIX E
RECEIVED AND FILED

9-11-91
SALLY MRVOS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1210

KESTUTIS EIDUKONIS,

Appellee

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,

Appellant

D.C. Civ. No. 86-05142

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*,
BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA,
COWEN, NYGAARD,
ALITO and ROTH, *Circuit Judges*
NEALON,* *District Judge*

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

* As to panel rehearing only.

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the Court in banc, the petition for rehearing is denied.

BY THE COURT,

S. Laall, I

Circuit Judge

DATED: September 11, 1991

(2)
No. 91-802

Supreme Court, U.S.
FILED

DEC 12 1991

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

KESTUTIS EIDUKONIS,

Respondent,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

**RESPONDENT'S BRIEF IN OPPOSITION
TO THE PETITION FOR WRIT OF
CERTIORARI AND SUPPLEMENTAL
APPENDIX**

Robert G. Bauer, Esquire
ABRAHAM, PRESSMAN
& BAUER, P.C.
1818 Market Street
Thirty-Fifth Floor
Philadelphia, PA 19103
(215) 569-9990

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court's finding that Mr. Eidukonis acted reasonably in remaining on military duty on February 18, 1985 was clearly erroneous, where he was ordered by the Army to extend his service for an additional 26 days in order to complete an important project on which he had already been working for 166 days, and which was nearly finished, and where he had given his employer over three months notice of the possibility of this extension.

2. Whether the District Court properly applied the "reasonableness" standard in finding that Mr. Eidukonis's decision to complete his military duty was protected under the Veterans' Reemployment Rights Act.

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.....	9
ARGUMENT.....	11
I. Granting The Writ Would Not Provide The Court With A Proper Case To Evaluate The Reasonableness Standards, Because The Third Circuit's Judgment Will Be Affirmed Regard- less Of What Standard Is Applied.....	11
II. The Only Leave Request Relevant To The Court's Inquiry Is The February 18, 1985 To March 15, 1985 Extension Of Eidukonis's Tour Of Duty At Fort Indiantown Gap	15
III. The District Court Properly Applied The Most Comprehensive Standard To Find That Eidu- konis Acted Reasonably.....	21
CONCLUSION.....	29
SUPPLEMENTAL APPENDIX	

TABLE OF AUTHORITIES

<i>Cases:</i>	Page
<i>Boyle v. Burke</i> , 925 F.2d 497 (1st Cir. 1991)	22
<i>Eidukonis v. SEPTA</i> , 873 F.2d 688 (3d Cir. 1989)	passim
<i>Gulf States Paper Corp. v. Ingram</i> , 811 F.2d 1464 (11th Cir. 1987)	8, 13, 22
<i>King v. St. Vincent's Hospital</i> , No. 90-889	13
<i>Kolkhorst v. Tilghman</i> , No. 89-1949	14, 15
<i>Kolkhorst v. Tilghman</i> , 897 F.2d 1282 (4th Cir. 1990)	14, 22
<i>Lee v. City of Pensacola</i> , 634 F.2d 886 (5th Cir. 1981)	23
<i>Sawyer v. Swift & Co.</i> , 836 F.2d 1257 (10th Cir. 1988)	22
<i>St. Vincent's Hospital vs. King</i> , 901 F.2d 1068 (11th Cir. 1990)	10, 13
<i>Statutes:</i>	
Vietnam Era Veterans' Readjustment Assistance Act of 1974 (Veterans' Reemployment Rights Act) 38 U.S.C. §2021, <i>et seq.</i>	7
38 U.S.C. §2021(b)(3)	7
38 U.S.C. §2024(d)	passim
<i>Court Rules:</i>	
Rules of The Supreme Court of The United States, Rule 10	11



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

KESTUTIS EIDUKONIS,
Respondent,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

**RESPONDENT'S BRIEF IN OPPOSITION TO
THE PETITION FOR WRIT OF CERTIORARI**

COUNTERSTATEMENT OF THE CASE

Kestutis Eidukonis was hired by SEPTA in 1981 as a Production Control Specialist. In February 1985, the period relevant to this case, there were two other upper level management employees in Eidukonis's department at SEPTA performing the same job duties as Eidukonis.

At the time Mr. Eidukonis applied for his position at SEPTA, he disclosed on his job application that he was a member of the United States Army Reserve. Pet. App.

40. Mr. Eidukonis was a Major in the Reserve assigned as an Individual Ready Reservist. As a reservist, Mr. Eidukonis had the obligation to attend two weeks of annual training, which he served at Fort Monroe, Virginia.

An individual ready reservist must express a willingness to accept annual military duty which exceeds two weeks. In theory, a refusal to participate in any training beyond the annual two-week period will not adversely affect a reservist's good standing. In practice, however, acceptance of a variety of assignments and experiences may enhance a reservist's potential for promotion. Pet. App. 40.

SEPTA provided to its administrative or management employees a handbook, entitled "SEPTA and YOU," which set forth the company's employment policies, including those pertaining to military leave. Pet. App. 40. The SEPTA employee handbook did not contain any written policy limiting the right of an employee to take leave for the performance of military duty. Prior to February 11, 1985, SEPTA had no written employment policy defining the manner in which requests for military leave should be made or limiting the amount of prior notice required or the duration, repetition or timing of leave for reserve duty. In fact, SEPTA had a specific policy, policy instruction number 6.17.1, labeled "Reemployment Rights After Military Training," which unequivocally stated that SEPTA would grant any leave requested for military training.

During the years 1981 through 1984, Mr. Eidukonis took extended military leaves of absence from his employment with SEPTA, lasting in some cases in excess of 140 days pursuant to his commitment as an individual ready reservist for the Army Reserve. Pet. App. 41. It is undisputed that SEPTA consented in writing to each and every one of these military leave requests, irrespective of the amount of notice given or the duration of the leave, without any objection or comment. Pet. App. 41.

In every instance, Mr. Eidukonis followed the same procedure when requesting a leave of absence: he notified his supervisor at SEPTA orally of his military orders and later confirmed the dates of absence from employment in writing by handing his supervisor a form provided by the Army describing the particular tour of duty. Pet. App. 41. SEPTA never questioned this procedure and, in fact, treated it as routine. Mr. Eidukonis never received any warning, criticism, or suggestion from SEPTA that this manner of giving notice was in any way improper or unacceptable. Pet. App. 42.

In the summer of 1984, Army personnel at Fort Indiantown Gap, Pennsylvania identified a critical safety problem involving the firing of artillery rounds, tank rounds and Air Force bombing rounds at the weapons firing ranges located there. The Post Commander at Fort Indiantown Gap, Colonel William D. Harris, was particularly concerned because several soldiers had been injured due to rounds of ammunition falling outside the range area, and general confusion over the use of the range. Major Dwayne C. Stout, Deputy Director of Plans, Training and Security at Fort Indiantown Gap, determined that the safety problem could be cured through the implementation of a computer system for the firing ranges. Major Stout canvassed the possibility of obtaining Mr. Eidukonis to accomplish this project with Lieutenant Colonel Berich, the Reserve Component Advisor to Colonel Harris. Mr. Eidukonis had spent a considerable amount of time the previous summer working with the computer systems at Fort Indiantown Gap and possessed the required computer programming know-how. Based on Mr. Eidukonis's special expertise and familiarity with the systems at Fort Indiantown Gap, and also because of a shortage of available active duty officers, Mr. Eidukonis was specifically selected for the task. Lieutenant Colonel Berich contacted Mr. Eidukonis in Fort Monroe, Virginia, where Mr. Eidukonis was serving his annual two-week training period from

August 13, 1984 to August 26, 1984.¹ Mr. Eidukonis expressed interest in the project, but told Colonel Berich he would have to speak again with his boss at SEPTA first.

On August 15, 1984, orders were issued instructing Mr. Eidukonis to report for active duty at Fort Indiantown Gap, where he was put in charge of developing and implementing a personal computer system for the firing ranges. SEPTA consented in writing to this military tour, which was originally scheduled as a 26-day tour, from September 5, 1984 to September 30, 1984.² Pet. App. 42. Near the end of this 26-day period, it became apparent that additional time and training would be required to implement the computers into the range management system. Colonel Harris and Major Stout informed Mr. Eidukonis that he was to remain to finish his work on the computer system. Accordingly, Colonel Harris and Major Stout arranged for Mr. Eidukonis's tour at Fort Indiantown Gap to be extended from October 1, 1984 until February 16, 1985. Mr. Eidukonis immediately telephoned his supervisor at SEPTA, Ollin Boyd, from Fort Indiantown Gap and notified Boyd of this extension. Boyd immediately granted and consented to this additional 140-day leave of absence without criticism, warning or comment. Pet. App. 42. Subsequently, SEPTA consented in writing to this 140-day extension without objection or comment concerning the length of the leave, the timing of the leave, the amount of notice given concerning the leave, or the manner by which Mr. Eidukonis notified SEPTA of this leave.

1. SEPTA consented in writing to this leave for annual training without objection or comment.

2. Prior to accepting this 26-day assignment, Eidukonis conferred with his supervisor at SEPTA, Ollin Boyd, and asked if SEPTA had any objection to his accepting the leave. Boyd voiced no objection, and in fact, expressed his approval in a conversation which took place in early August 1984, before Eidukonis left for Fort Monroe to serve his annual two-week training.

that project in mid-air would have been unfair to his supervisors at Fort Indiantown Gap.

On February 5, 1985, the Army approved Major Stout's request from Fort Indiantown Gap that Mr. Eidukonis's period of active duty be extended for 26 days so that his work on the firing range computer project could be completed. Pet. App. 43. Although the written military orders were issued at the Army Reserve Personnel Center in St. Louis, Missouri on Friday, February 5, 1985, Mr. Eidukonis did not learn that the request had been approved until February 8, 1985.⁴ Mr. Eidukonis immediately telephoned Mr. Boyd at SEPTA that same day and informed him that his tour of military service was extended until March 15, 1985. Pet. App. 43. Mr. Eidukonis then asked Boyd's permission to take the 26-day extension and Mr. Boyd consented, assuring Mr. Eidukonis that it was "no problem." Relying on Mr. Boyd's assurance that SEPTA had preapproved this short extension, Mr. Eidukonis contacted his military superiors and informed them that he was able to accept the 26-day extension and complete the important assignment he had nearly finished.

By letter dated February 11, 1985, Mr. Boyd abruptly informed Mr. Eidukonis that if he did not return to work at SEPTA on February 18, 1985, (the first day after his 140-day mission ended) his employment status at SEPTA would be placed in immediate jeopardy. Boyd issued this surprise ultimatum even though SEPTA could have made alternative arrangements to fulfill Mr. Eidukonis's job responsibilities during the period of the short extension.⁵

4. This was not unusual. In fact, there is often an interval of 60 days or more between the time a reservist first learns that a tour of duty is a possibility and the time the reservist receives his formal orders.

5. SEPTA plainly admitted this at trial. Eidukonis even offered to come in to SEPTA on the weekends to help alleviate any workload burden at SEPTA caused by the 26-day extension. Boyd did not act on Eidukonis's suggestion.

Mr. Eidukonis immediately sought legal advice from Major Dennis Olgin, an attorney and legal officer at Fort Indiantown Gap, to determine how he should respond to this letter. Pet. App. 44. Major Olgin advised Mr. Eidukonis that SEPTA could not terminate his employment because of his compliance with duly received military orders and his failure to report to work on February 18, 1985. Pet. App. 44. Based upon that advice, Mr. Eidukonis did not report for work on February 18, 1985 at SEPTA, but remained at Fort Indiantown Gap in compliance with his military orders and completed his work on the computer systems for the firing ranges.

By letter dated February 20, 1985, SEPTA suspended Mr. Eidukonis from his employment with intent to terminate for his failure to return to work on February 18, 1985. Pet. App. 43. Mr. Eidukonis responded to this letter by referring SEPTA to the United States Department of Labor's Office of Veterans' Reemployment Rights, adding that he hoped the problem could be solved amiably. SEPTA did not contact that office. Instead, on April 13, 1985, SEPTA formally discharged Mr. Eidukonis for his failure to disobey military orders requiring him to remain at Fort Indiantown Gap, rather than return to SEPTA on February 18, 1985. Pet. App. 43.

Eidukonis subsequently brought suit under the Veterans' Reemployment Rights Act, 38 U.S.C. §2021, *et seq.*, seeking restitution of lost wages and employment benefits under §2021(b)(3), and §2024(d) of the Act. On June 3, 1988, the District Court entered a judgment in favor of Eidukonis. SEPTA appealed to the Third Circuit Court of Appeals, which held, in a question of first impression for the Court, that a reservist's request for leave must be reasonable in order to enjoy the protections of the statute. *Eidukonis vs. SEPTA*, 873 F.2d 688, 694 (3rd Cir. 1989). Noting that the District Court may have believed that it was not permissible for it to consider the employer's situation in evaluating reasonableness, the Third Circuit panel, over a dissenting

opinion by Judge Becker, concluded that a standard which evaluates a reservist's request for leave and the employer's response to that request on the basis of reasonableness under all the circumstances is required under §2024(d). *Id.* at 694.

The standard adopted by the Third Circuit allows for the closest possible scrutiny of a reservist's conduct in requesting leave of absence and results in an inquiry in which the employer's needs and the burden on the employer are weighted equally with the reservist's concerns and actions. Unlike the standard adopted by the Eleventh Circuit in *Gulf States Paper Corp. vs. Ingram*, 811 F.2d 1464 (11th Cir. 1987) and the position urged by Judge Becker, in his dissent, Pet. App. 35, the Third Circuit test does not accord a presumption of reasonableness to a reservist's request for leave.

The Third Circuit remanded to the District Court so that it could reconsider the employer's situation in evaluating reasonableness and make such additional findings of fact and conclusions of law as were necessary to accommodate an examination of the reasonableness of the parties under all the circumstances. *Eidukonis*, 873 F.2d at 697. On remand, the District Court again entered judgment in favor of Eidukonis, entering a verdict on February 27, 1991 against SEPTA in the amount of \$83,526.29 plus interest computed from June 2, 1988. On remand, the District Court found that while Mr. Eidukonis acted reasonably and in good faith, SEPTA did not. Pet. App. 51. The District Court found that SEPTA violated §2024(d) of the Veterans' Reemployment Rights Act when it terminated Mr. Eidukonis's employment. Pet. App. 50.

SEPTA appealed again, asserting that the District Court's finding that Eidukonis acted reasonably was against the weight of the evidence presented. SEPTA also contended in the second appeal that the District Court's finding that SEPTA acted unreasonably and in bad faith was also against the weight of the evidence. On appeal, the Third Circuit found that the District Court's

findings were not against the weight of the evidence, as the Court affirmed without opinion on August 12, 1991.

SUMMARY OF THE ARGUMENT

The Veterans' Reemployment Rights Act, 38 U.S.C. §2024(d), mandates that leave for reserve duty "shall upon request be granted," and that reservists "shall be permitted to return to [the] position[s] [that they] would have had if [they] had not been absent for such purposes." Despite the clear and unequivocal terms of §2024(d), various courts have engrafted a reasonableness requirement into the statute, holding that a reservist has no right to return to his job unless the requested leave is reasonable.

Of the courts which have adopted a reasonableness standard, the test developed by the Third Circuit in *Eidukonis vs. SEPTA*, 873 F.2d 688, 694 (3rd Cir. 1989), is the broadest standard devised by any Circuit Court. The Third Circuit standard evaluates the reasonableness of an employee's request for leave under all the circumstances. *Id.* at 694. The District Court found, and the Third Circuit affirmed the finding, that Eidukonis acted reasonably and in good faith in remaining on military duty on February 18, 1985, where he was ordered by the Army to extend his service for an additional twenty-six (26) days in order to complete an important project on which he had already been working for 166 days. Pet. App. 44. The Court also found that Eidukonis had given SEPTA over three months notice of the possibility of this extension. Pet. App. 42. Further, SEPTA had not notified him that there were any limits on the amount of leave a reservist could take, and had not given him any warning that he could be terminated because of his leave until after his orders for this assignment had been issued, only one week before the brief twenty-six (26) day extension was to begin. Pet. App. 42-43. The Court also determined that Eidukonis was terminated solely because of the request for military

leave beginning February 18, 1985, not for his conduct relating to any prior or subsequent military leaves or any personal disputes with his supervisors at SEPTA, and not because of the amount of notice he gave SEPTA for any of his military leaves. Pet. App. 43.

The District Court applied the "reasonableness under all the circumstances" test to conclude that Eidukonis acted reasonably in remaining on military duty, and the Third Circuit affirmed this finding. There can be no broader standard than one which permits consideration of all the circumstances. Because the District Court and the Third Circuit have already concluded that Eidukonis acted reasonably under the most comprehensive test, no important purpose is served by the Supreme Court evaluating the same conduct under a narrower or identical standard. Regardless of whether the Supreme Court discards the concept of a reasonableness standard entirely or modifies the standard enunciated by the Third Circuit, the judgment in favor of Eidukonis will stand.

The Supreme Court should not grant certiorari in a case where its resolution of the issues does not make a difference to the outcome of the case. This is especially true because certiorari has been granted and oral argument has already been held in the case of *William "Sky" King vs. St. Vincent Hospital*, No. 90-889. In *King*, the Court is directly confronted with the threshold issue whether §2024(d) of the Act requires a reservist's conduct to be evaluated under a reasonableness standard. That case cannot be resolved without a definitive ruling by the Supreme Court on that issue. This is unlike the scenario presented by the *Eidukonis* case, in which, assuming a reasonableness standard applies, the reservist's conduct has been found reasonable under the broadest test devised and no modification of the standard by the Supreme Court could change the outcome of the case or the finding that Eidukonis acted reasonably. Because certiorari is not a matter of right, but of the

Court's discretion, it should not be granted in these circumstances.

ARGUMENT

I. GRANTING THE WRIT WOULD NOT PROVIDE THE COURT WITH A PROPER CASE TO EVALUATE THE REASONABLENESS STANDARDS, BECAUSE THE THIRD CIRCUIT'S JUDGMENT WILL BE AFFIRMED REGARDLESS OF WHAT STANDARD IS APPLIED

Under Supreme Court Rule 10, a petition for writ of certiorari should only be granted when there are special and important reasons therefore. Underlying this admonition is the presumption that the issues which make a case of sufficient importance to merit Supreme Court review actually need to be decided for the outcome of that case to be finally determined. If the Court's resolution of these issues makes a genuine difference to the decision in the case then before it, there is a proper factual foundation for the Court's analysis and opinion. On the other hand, if the Court's determination of the issues will not matter one way or the other to the outcome of the case, then the Court runs the danger of rendering only an advisory opinion.

It is submitted that the *Eidukonis* case does not provide the Court with the opportunity to define the interpretation and application of §2024(d) in a case where that definition makes any difference to the outcome. There are two ultimate questions concerning the proper interpretation of §2024(d) which require a definitive resolution by the Supreme Court. First, is a reasonableness standard to be applied to a reservist's request for a leave of absence under §2024(d), and, second, if a reasonableness standard applies, what factors are properly considered by the Court in determining whether a particular request for leave was reasonable? Regardless of how these two questions are resolved, under the facts found by the District Court, and the extremely broad

legal standard applied by the Third Circuit, the judgment in *Eidukonis* must be affirmed.

If the Court determines that a reservist's request for leave of absence need not be subjected to a reasonableness test, then there is no need to reach the issue whether Eidukonis acted reasonably with regard to taking military leave. It was not disputed on either appeal in this matter that Eidukonis's requests for leave were covered under the literal terms of the statute, and that without consideration of a reasonableness standard, he was entitled to reemployment by SEPTA upon his return from military duty.

If the Court ultimately decides that a reasonableness standard is appropriate, Eidukonis will be found to have acted reasonably under whatever standard is fashioned by the Court, because his conduct has already been deemed reasonable under the most comprehensive standard devised. Using the "totality of the circumstances" standard created by the Third Circuit in *Eidukonis vs. SEPTA*, 873 F.2d 688 (3rd Cir. 1989) (*Eidukonis I*), the District Court found that Eidukonis acted reasonably and in good faith in accepting the February 18, 1985 twenty-six (26) day extension of his duty and in completing his important assignment at Fort Indiantown Gap. Pet. App. 44. If his conduct has been found reasonable under the Third Circuit's approach, which is the broadest standard devised by any Circuit Court and permits consideration of the largest range of factors, (see discussion *infra* section III), it is extremely doubtful that the same conduct would suddenly become unreasonable when subjected to a curtailed and less rigorous examination. There can be no more expansive criterion than one which permits consideration of all the circumstances. Thus, regardless of whether the Supreme Court discards the concept of a reasonableness standard entirely or modifies the standard enunciated by the Third Circuit, the judgment in favor of Eidukonis will stand.

In contrast, there are two cases presently pending before the Supreme Court which require a definitive

resolution of these issues in order for the cases to be decided. Certiorari has been granted and oral argument has already been held in the case of *William "Sky" King vs. St. Vincent's Hospital*, No. 90-889. In that case, the Eleventh Circuit found that a reasonableness standard applies to a reservist's request for leave of absence under §2024(d) and that a three year leave of absence is *per se* unreasonable. *St. Vincent's Hospital vs. King*, 901 F.2d 1068, 1072 (11th Cir. 1990). In finding that the employee's request for leave was unreasonable, the Eleventh Circuit was guided by the test set forth in *Gulf States Paper Corp. vs. Ingram*, 811 F.2d 1464 (11th Cir. 1987), which judges reasonableness on the basis of three factors: the length of the leave, the employee's actions, and the burden placed on the employer. *Gulf States*, 811 F.2d at 1469. In the *King* appeal, the Solicitor General has argued that an employee's right under §2024(d) to a leave of absence is not conditioned on the reasonableness of the employee's request for leave. St. Vincent's Hospital contends on appeal that a reasonableness test is appropriate.

In *King*, the Court is directly confronted with the threshold issue whether §2024(d) of the Act requires a reservist's conduct to be evaluated under a reasonableness standard. That case cannot be resolved without a definitive ruling by the Supreme Court on that issue. This alone is a special and important reason to grant certiorari, which is not present in the *Eidukonis* case. If the Court finds that a reasonableness test is warranted, it will then evaluate the three factor *Gulf States* test applied by the Eleventh Circuit and determine whether that is the appropriate standard to be used. The *Gulf States* test is significantly narrower than the Third Circuit's "totality of the circumstances" standard, as it accords a presumption of reasonableness to a reservist's request for leave. *Gulf States*, 811 F.2d at 1469. Under the standard applied by the Third Circuit, no presumption of reasonableness attaches to the reservist's conduct.

If the Court finds in the *King* case that no reasonableness requirement applies to a reservist's request for leave, then the Third Circuit's decision in favor of Eidukonis must of necessity be affirmed. If the Court in the *King* case determines that a reasonableness standard applies, then it must articulate what that standard is, in order to determine whether *King's* request for leave of absence was reasonable. Because *King's* request for leave was found unreasonable by the Eleventh Circuit, the Court's discussion and definition of the reasonableness standard will be required to determine the outcome of the case. This is unlike the scenario presented by the *Eidukonis* case, in which the employee's conduct has been found reasonable under the broadest standard devised, without the benefit of a presumption of reasonableness, and the Court's adoption of a different standard would not change the outcome of the case. The *Eidukonis* case, therefore, does not provide the Court with a setting conducive to any meaningful discussion of the issues.

In its petition, SEPTA contends that the *Eidukonis* case would enable the Court to fashion the appropriate reasonableness test. If a reasonableness test applies however, the Court must define the reasonableness test in connection with the *King* case, which is already before the Court. The need for an articulation of the reasonableness standard is therefore no basis for granting the Writ in the instant case.

A petition for certiorari has also been filed in *Kolkhorst vs. Tilghman*, No. 89-1949, which presents the Court with another opportunity to evaluate whether a reasonableness standard is required under §2024(d). In *Kolkhorst vs. Tilghman*, 897 F.2d 1282 (4th Cir. 1990), the Fourth Circuit found that the Baltimore Police Department's policy limiting to 100 the number of police officers, other than new hires, who were allowed to join in active military reserve units violated the non-discriminatory provisions of §2021(b)(3). *Kolkhorst*, 897 F.2d at 1285. The Court also held that the

Police Department's refusal to grant Kolkhorst leave for military reserve training violated §2024(d). *Id.* The Court found that reasonableness is not required under §2024(d), and awarded damages to the reservist. *Id.* *Kolkhorst* presents the Court with another opportunity to address the question whether a reasonableness standard applies to §2024(d), and if so, what factors are to be considered by the Court in determining reasonableness.

The Fourth Circuit in *Kolkhorst* did not articulate its own version of the reasonableness standard. If the Court desires a meaningful factual context against which to present a reasonableness standard, the *Kolkhorst* case presents that opportunity. In contrast, the "totality of the circumstances" test fashioned by the Third Circuit in *Eidukonis* is so broad and permits such a complete evaluation of a reservist's conduct that any standard articulated by the Court could not be more expansive, and thus would not change the outcome of the case or the finding that Eidukonis acted reasonably. Because certiorari is not a matter of right, but of the Court's discretion, it should not be granted in these circumstances.

II. THE ONLY LEAVE REQUEST RELEVANT TO THE COURT'S INQUIRY IS THE FEBRUARY 18, 1985 TO MARCH 15, 1985 EXTENSION OF EIDUKONIS'S TOUR OF DUTY AT FORT INDIANTOWN GAP

In its petition, SEPTA repeatedly urges the Court to consider leave requests prior to and subsequent to the request for which Eidukonis was terminated, the twenty-six (26) day extension of his tour of duty at Fort Indiantown Gap beginning February 18, 1985. *See* SEPTA's Petition at 26, and SEPTA's Questions Presented 1, 2, 4 and 6. Regardless of what legal standard of reasonableness is applied, evidence surrounding other leaves of absence is irrelevant, because SEPTA has admitted that Eidukonis was not terminated for accepting any other leave.

The District Court found that Mr. Eidukonis was terminated by SEPTA solely because of his failure to report back from duty on February 18, 1985.⁶ Accordingly, the "employee's request for leave" to be scrutinized from both the employee's and the employer's perspective under a reasonableness standard is the February 18, 1985 to March 15, 1985, 26-day extension of Eidukonis's tour of duty at Fort Indiantown Gap. Any evidence relating to Eidukonis's request for leave to serve the annual two-week training period from March 18, 1985 until March 30, 1985 is irrelevant. As the panel in *Eidukonis I* cogently stated: "(W)e begin with the national importance of reserve status . . . It follows that a request for leave to serve the obligatory two-week training period is *per se* reasonable." *Eidukonis*, 873 F.2d at 695. In its petition, SEPTA does not object to the inclusion of this factor in a reasonableness test. Thus, the District Court's focus on the 26-day request for purposes of applying the reasonableness test was entirely proper. SEPTA's insistence that the District Court erred when failing to take into account the obligatory two-week training period scheduled for March 1985, see Petition of SEPTA at 26, ignores the very first factor pronounced by the Court in *Eidukonis*. For the same reason, evidence relating to the reasonableness of both Mr. Eidukonis's and SEPTA's conduct surrounding the request for the two-week annual training from August 13, 1984 through August 25, 1984 is also not relevant.

The only other leave requests which SEPTA contends should have been evaluated differently by the District Court were the 26-day leave beginning September 5, 1984 and ending October 1, 1984 and the 140-day extension of that leave until February 18, 1985.⁷ Re-

6. SEPTA repeatedly conceded this fact at trial.

7. SEPTA conveniently ignores its prior grants of leave in 1981 (153 days), 1982 (144 days), and 1983 (88 days) and argued on appeal that the relevant events started in May of 1984. The

gardless of what standard is applied, Eidukonis's acceptance of these leaves cannot be considered unreasonable since it is undisputed that SEPTA consented in writing to both the 26-day leave and the 140-day initial extension of that leave. In fact, Ollin Boyd, Eidukonis's supervisor at SEPTA, approved both the leave and the extension in writing on a SEPTA employment/termination form. Pet. App. 42. Ollin Boyd's signature may be found on the employment/termination form specifically approving this leave and 140-day extension, on the line in the space indicated "Department Approval." Both the initial leave and the extension were also approved by an individual in SEPTA's Employee Relations Department. In evaluating the District Court's finding that the February 18, 1985 to March 15, 1985 26-day extension is the relevant leave request to be evaluated under a reasonableness test, this Court is urged to consider that SEPTA approved all requests for military duty falling before that 26-day period in writing and that the only request for leave falling after that time frame was, pursuant to a factor not objected to by SEPTA, *per se* reasonable. SEPTA's suggestion that the District Court should have deemed "unreasonable" leave requests totalling 178 days which were approved by SEPTA in writing reveals the weakness of its overall objection to the District Court's findings.

Having been required to justify its termination of Mr. Eidukonis after the fact, SEPTA of necessity dredges up information relating to previous military leaves dating back to 1981 (all of which were approved by SEPTA in writing), personal differences between Mr. Eidukonis and his SEPTA supervisors, the extent of notice given by Mr. Eidukonis to SEPTA in taking military leaves, and Mr. Eidukonis's personal motives in accepting military orders from the Army. See SEPTA's

significance of these leave requests is that SEPTA consented to every one of them without comment or criticism concerning their duration, timing, or the extent or manner of notice given.

Questions Presented 1, 2 and 4. None of this evidence is relevant, because SEPTA has repeatedly admitted that none of these factors played any part in its decision to terminate Mr. Eidukonis. On the contrary, Mr. Eidukonis was fired solely and exclusively for his refusal to return to work on February 18, 1985. The testimony of the SEPTA supervisor who terminated Mr. Eidukonis, Ollin Boyd, could not have been more clear on this point. At trial, Boyd was asked:

MR. BAUER: Well, whatever the terminology is, sir, there is no question that the reason that Mr. Eidukonis was suspended by you on your letter of February 20th was his refusal to come back to work at the conclusion of 140 day leave on February 18, 1985; isn't that correct?

THE WITNESS: Absolutely.

MR. BAUER: That is the only reason he was fired; isn't that right?

THE WITNESS: Absolutely.

MR. BAUER: He was not fired for seeking retribution against SEPTA, was he?

THE WITNESS: No. He was fired for failure to follow a directive.

MR. BAUER: He was not fired because he had complained to Mr. Bratelli about you?

THE WITNESS: He didn't follow a directive.

MR. BAUER: And sir, he was not fired because he gave you inadequate notice that he was going to go on the extension of 26 days that commenced on February 18th either, was he?

THE WITNESS: I gave Mr. Eidukonis a direct order to return -

MR. BAUER: Your Honor. I ask that the witness be asked to answer the question.

Significantly, the District Court found as a fact that Mr. Eidukonis was not fired because of his acceptance of the September 5, 1984 to September 30, 1984 military leave, nor was he fired for his acceptance of the 140-day extension of that military leave from October 1, 1984 to February 16, 1985. Pet. App. 43. Neither was he fired for his acceptance of any previous military leaves. Pet. App. 43. The Court found that Mr. Eidukonis was not fired because of the amount of notice he gave SEPTA for any of his military leaves, nor for the number or length of any military leaves. Pet. App. 43. The Court found that Mr. Eidukonis was not fired because of his job performance, nor because he had filed an internal civil rights complaint, nor because he made derogatory comments about SEPTA supervisors, nor because of his desire for a transfer, and not because he broke any promises about seeking military duty. App. 43. SEPTA did not, and, of course could not, challenge the validity of these factual findings on appeal. Mr. Eidukonis was fired for only one reason: his failure to follow a directive requiring his return to work on February 18, 1985. Boyd's testimony was absolutely unequivocal on this point.

Because Mr. Eidukonis was discharged solely because of his reservist status on February 18, 1985 and not for his conduct relating to any prior or subsequent military leaves or any personal dispute with his supervisors at SEPTA, evidence of such conduct is not relevant to the issue whether he acted reasonably with respect to the request for military leave beginning February 18, 1985, the ultimate issue on the merits in this appeal. For the same reason, in applying the various factors which bear on the reasonableness of the employer's position, evidence which relates to SEPTA's conduct and SEPTA's needs during military leaves other than the February 18, 1985 to March 15, 1985 leave is also irrelevant. Viewed in the context of the evidence pertaining to the only leave request relevant to this case, February 18, 1985 to March 15, 1985, it is apparent that regardless of what legal standard of reasonableness is

applied, Mr. Eidukonis acted reasonably in obeying his military orders requiring him to remain on duty on February 18, 1985.

III. THE DISTRICT COURT PROPERLY APPLIED THE MOST COMPREHENSIVE STANDARD TO FIND THAT EIDUKONIS ACTED REASONABLY

In *Eidukonis I*, the Third Circuit articulated its interpretation of the Veterans' Reemployment Rights Act, 38 U.S.C. §2024(d). In explaining the reasonableness standard which applies to both a reservist's request for military leave and the civilian employer's response to that request, the Third Circuit has developed the broadest and most comprehensive reasonableness test of any Circuit Court. The Third Circuit has identified thirteen specific factors to be applied to the conduct of the parties. The factors to be applied in evaluating the reasonableness of the employee's leave request include: 1) whether the request is for the obligatory two-week training period or during a national emergency (such requests are *per se* reasonable); 2) the employee's ability to schedule the leave at another time; 3) whether the request was to extend a current leave or was for a discrete term; 4) the promptness of the request; 5) whether the employee previously knew that a leave or an extension was a possibility; 6) the employee's bad faith or lack thereof; and 7) whether the employee inquired of a military legal officer and followed the advice given. *Eidukonis*, 873 F.2d at 695-696. The Court also enumerated the following factors which bear on the reasonableness of the employer's conduct in denying a leave request: 1) the employer's special needs for this particular employee; 2) the employer's ability to find a substitute to assume the employee's duties; 3) any special circumstances concerning the workload during the particular period for which leave was requested; 4) the extent of the additional costs incurred by the employer if it were to accommodate the reservist's request; 5) the

clarity with which the employer has informed its employees of its policy on the duration, repetition, timing and notice required for leave for military duty; and 6) whether the employer denies leaves for military duty while allowing them for other purposes.

The Third Circuit noted that these factors were illustrative and not inclusive. *Id.* at 695. The test thus truly allows consideration of "all the circumstances" in that a District Court is permitted to examine other factors it deems relevant to the conduct of the reservist.

The applicable standard in the Eleventh Circuit, developed by the Court in *Gulf States Paper Corp. vs. Ingram*, 811 F.2d 1464 (11th Cir. 1987), rejects a totality of the circumstances test, holding that reasonableness must be judged on the basis of three factors: the length of the leave, the employees actions, and the burden on the employer. *Gulf States*, 811 F.2d at 1469. This standard is considerably narrower than the totality of the circumstances standard of the Third Circuit, in that the *Gulf States*, test accords a presumption of reasonableness to a reservist's request for leave. *Id.* Under the Third Circuit approach, no presumption of reasonableness attaches to the reservist's conduct, and its reasonableness must be evaluated under all the circumstances. *Eidukonis vs. SEPTA*, 873 F.2d 688, 694 (3rd Cir. 1989).

Other circuits have not developed any reasonableness tests which approach the broad standard fashioned by the Third Circuit. See *Kolkhorst vs. Tilghman*, 897 F.2d at 1285-1286 (4th Cir. 1990) (rejecting the concept of a reasonableness test in applying §2024(d); *Boyle vs. Burke*, 925 F.2d 497, 503 (1st Cir. 1991) (declining to decide whether a reasonableness standard is appropriate); and *Sawyer vs. Swift & Co.*, 836 F.2d 1257, 1260 (10th Cir. 1988) (finding that the phrase "upon request" in §2024(d) includes an implicit requirement that the request be made "after proper notice," but declining to identify what other factors may be considered and avoiding the creation of a reasonableness standard). The

seven specific factors identified by the Third Circuit upon which the reasonableness of an employee's request for leave is evaluated allow the most exhaustive examination of a reservist's conduct in taking the leave, and thus provide employers with the greatest amount of protection from unreasonable or bad faith conduct. Even under such scrutiny, the District Court correctly concluded and the Third Circuit affirmed that Eidukonis acted reasonably in remaining on duty on February 18, 1985.

The first factor announced by the Third Circuit asks whether the leave request at issue is for the mandatory annual two-week training period required of all reservists or occurs during a national emergency. It follows that Mr. Eidukonis's request for leave to serve his annual two-week training period from March 18, 1985 until March 30, 1985 was *per se* reasonable, as was his request to serve his mandatory two-week training period from August 13, 1984 to August 26, 1984.

The Third Circuit next allowed that the reasonableness inquiry should not ignore whether the employee had the option of scheduling the military training or duty for a different time. *Eidukonis*, 873 F.2d at 695. In this regard, it would have been unreasonable for Mr. Eidukonis to leave unfinished the project he had been working on for over 140 days. Mr. Eidukonis was in the middle of an important computer project and he testified that to leave that project in midstream would have been unfair to his supervisors at Fort Indiantown Gap. The project involved the safety of the firing ranges, and Mr. Eidukonis testified that he felt that it was his responsibility to complete the project. This case is therefore unlike the factual scenario presented to the Court in *Lee v. City of Pensacola*, 634 F.2d 886, 889 (5th Cir. 1981), where the reservist had other opportunities to complete the six phases of the training course. This case, moreover, does not involve a question of convenience or of deferring a leave until a more appropriate time. This case involves a reservist nearing completion of a vital

mission for which there were no other available or qualified personnel.

At trial, Major Stout, Eidukonis's commander for this project at Fort Indiantown Gap, described the importance of controlling the range's scheduling problems. He also stressed that it was a matter of great urgency, as the base was trying to solve the safety problems before the impending and annual summer reserve training, which always resulted in severe artillery range overcrowding.⁸ The record reveals that replacing Mr. Eidukonis at this late juncture would have created significant delays because he was the only person well-acquainted with the project. Major Stout testified that he considered it critical to retain Mr. Eidukonis for the additional 26 days required to complete the project.

This evidence provides abundant support for the District Court's conclusion that Mr. Eidukonis could not reasonably have been expected to reschedule or postpone this tour of duty. Pet. App. 47. In light of the program's nearly-complete status, Eidukonis's integral role, the absence of any other available officer, the military need for prompt completion, and the failure of SEPTA to communicate any particular need of equal importance to Mr. Eidukonis, Mr. Eidukonis did not have a genuine option to reschedule or postpone this brief extension of duty.

The Third Circuit indicated that a relevant factor is whether the leave request is for an extension rather than for a discrete service finite in time and complete in and of itself. *Eidukonis*, 873 F.2d at 695. That a particular tour of duty is extended carries with it the presumption that a military judgment has been made that the military wants this reservist to complete a certain mission before returning to his civilian employer. It is undisputed that Mr. Eidukonis did not solicit this 26-day extension.

8. Between 170,000 and 200,000 reservists were trained at Fort Indiantown Gap in 1985.

Rather, the military identified a particular need and specifically selected and obtained Mr. Eidukonis to fulfill that need. Colonel Harris and Major Stout ordered Mr. Eidukonis to remain at Fort Indiantown Gap to complete his work on the computer system. Accordingly, Major Stout arranged for Mr. Eidukonis's tour to be extended for 26 days so that his work on the firing range computer project could be completed. The extension request was for a brief period to complete an important military project at the request of Eidukonis's commanding officers. Having been repeatedly granted such leaves for years by SEPTA, it is not surprising that the District Court found Eidukonis's acceptance of this leave reasonable and in good faith. Pet. App. 51.

The Third Circuit stated that a request made as early as possible would be more reasonable than one made at the last minute. *Id.* at 695. The District Court found that the Army's request for Mr. Eidukonis's period of active duty to be extended for an additional 26 days was approved on February 5, 1985. Although the formal military orders were issued at the Army Reserve Personnel Center in St. Louis, Missouri on February 5th, Mr. Eidukonis did not learn that the request had been approved until February 8, 1985. Mr. Eidukonis then immediately telephoned Boyd at SEPTA on February 8th and informed him that his tour of military service was extended to March 15, 1985. Eidukonis's request to accept the 26-day extension was made as early as possible and was patently reasonable.

The Third Circuit also announced that it is relevant whether the employee previously knew that a leave or an extension thereof was a possibility. On October 29, 1984, Mr. Eidukonis informed Boyd that his 140-day period of active duty might be extended. Pet. App. 42. Mr. Eidukonis told Boyd that he was doing vital work for the Army and that he was the only one that the Army felt competent to be placed in such a critical position. Applying this factor, Mr. Eidukonis acted reasonably in

apprising SEPTA of the possibility of the 26-day extension nearly four months before it occurred.

It is also relevant whether the employee inquired of a military legal officer and followed the advice given. The uncontroverted testimony established that on February 11, 1985, when Mr. Eidukonis was first informed by Boyd that he must return to work at SEPTA by February 18, 1985 rather than remaining on military duty, Mr. Eidukonis immediately consulted with Major Dennis Olgin, an attorney and legal officer at Fort Indiantown Gap, to determine whether he could remain there. While the Third Circuit has indicated that this factor alone is not dispositive, it is certainly relevant and provides further support for the District Court's finding that Mr. Eidukonis acted reasonably.

Finally, the Third Circuit stated that an employee's bad faith or lack thereof will be relevant. SEPTA attempts to construct a web of unreasonable conduct by contending that Mr. Eidukonis, apparently in conspiracy with the Army, structured a series of leaves that resulted in his being absent from his employment for an inordinate amount of time. The testimony of Major Burkey, a former Army Reserve Personnel management officer responsible for scheduling the leaves of 1,500 reservists, established that a reservist does not have the ability to unilaterally schedule himself for reserve duty and that no tour of duty is a foregone conclusion until orders are issued. Before Mr. Eidukonis, or any other reservist for that matter, could obtain a leave or an extension, the Army's chain of command would: 1) determine that it required his services for that time frame; 2) approve his leave request; 3) secure the necessary funding for the tour of duty requested; and 4) issue orders in connection with that request.

Major Burkey testified to the process by which an active duty tour is approved. First, the request for leave must be initiated, either by the reservist or by his personnel management officer (PMO). Second, the particular tour is discussed between the reservist and his

PMO so that some rough agreement as to location and dates is explored. Third, the PMO prepares a disposition form, an internal Army document, and forwards it to the training coordinators in the particular training support division. Fourth, once the training coordinator has received the disposition form, the training coordinator is required to call the particular military installation involved and inquire as to whether they are in need of an officer with the background and skill of the particular reservist requesting duty. Fifth, after the training coordinator speaks with officials at the military installation, the training coordinator will, sixth, indicate on the disposition form whether the suggested training is acceptable to the military installation. Seventh, the training coordinator forwards the revised disposition form back to the PMO for his review. Eighth, the PMO will review the disposition form and then contact the reservist and advise him if the tour is available. Ninth, if the tour is available and each of the preceding conditions has occurred, the PMO will then initiate a request for orders, or RFO, for those dates and times at that installation and submit it to the training support division so that formal orders may be arranged. Finally, once the training support division processes the request for orders, it takes another thirty days for the reservist to receive his or her formal orders. SEPTA's misrepresentation of the record in this regard in its petition, suggesting that Mr. Eidukonis could obtain military leaves whenever and wherever he wanted at his whim, should be disregarded.


Under all the circumstances, the District Court did not err in finding that Mr. Eidukonis acted reasonably and in good faith in accepting a brief extension of his military duty in order to complete an important mission on which he had been working for 140 days. If a reasonableness standard is to be applied to requests for leave of absence under §2024(d), then no employer can complain of the Third Circuit's "totality of the circumstances" test, which permits the most extensive inquiry

into a reservist's conduct in requesting leave. There can be no broader standard than one which permits consideration of all the circumstances. Both the District Court and the Third Circuit concluded that Eidukonis acted reasonably under this comprehensive standard. No important purpose is served by the Supreme Court evaluating the same conduct under a narrower or identical standard. Accordingly, the writ of certiorari should not be granted.

CONCLUSION

For all the foregoing reasons, the Petition should be
DENIED.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Robert G. Bauer". The signature is fluid and cursive, with the first name "Robert" and last name "Bauer" clearly distinguishable.

**ROBERT G. BAUER
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Attorney for Respondent
Kestutis Eidukonis**

DATED: December 11, 1991

SUPPLEMENTAL APPENDIX



Q. Yes. He was not fired for seeking retribution against SEPTA, was he?

A. No. He was fired for failure to follow a directive.

Q. He was not fired because he had complained to Mr. Brattelli about you, was he?

A. Can I give you just one he was fired or do you want to go through all of that?

Q. I will go through all of them and you can just do it once. Now you are getting the hang of it.

A. He didn't follow a directive. I told him, I said, come back to work. I called him, I wrote him, he didn't come back to work, and I fired him.

Q. He wasn't fired. I will go through them all at once.

THE COURT: No, no, don't go through them all. He said he was fired for not following the directive.

MR. BAUER: All right. You get the point.

BY MR. BAUER:

Q. And sir, he was not fired because he gave you inadequate notice that he was going to go on the extension of 26 days that

Excerpt from Court of Appeals Appendix – 266A

Boyd – Direct

commenced on February 18th either, was he?

A. I gave Mr. Eidukonis a direct order to return –

MR. BAUER: Your Honor, I ask that the witness be asked to answer the question.

THE WITNESS: – on the 18th of February and he didn't come back.

THE COURT: Wait a minute. Wait a minute, Mr. Boyd. The question is he was not fired because you got inadequate notice of his plan to take – I guess remain on military leave?

MR. BAUER: For 26 days commencing February 18th.

THE COURT: Answer that question and then you may explain all you want.

THE WITNESS: No.

BY MR. BAUER:

Q. Now, if you would like to make an explanation, you can.

A. No.

Q. All right.

THE COURT: You may explain if you like, Mr. Boyd.

THE WITNESS: I gave Mr. Eidukonis a direct order verbally and I wrote him a letter. I told him to come back to work and he didn't come back to work and I suspended him pending discharge.

- - -

3
No. 91-802

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

KESTUTIS EIDUKONIS,

Respondent,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,

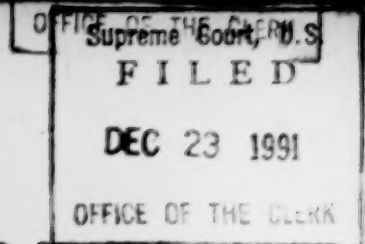
Petitioner,

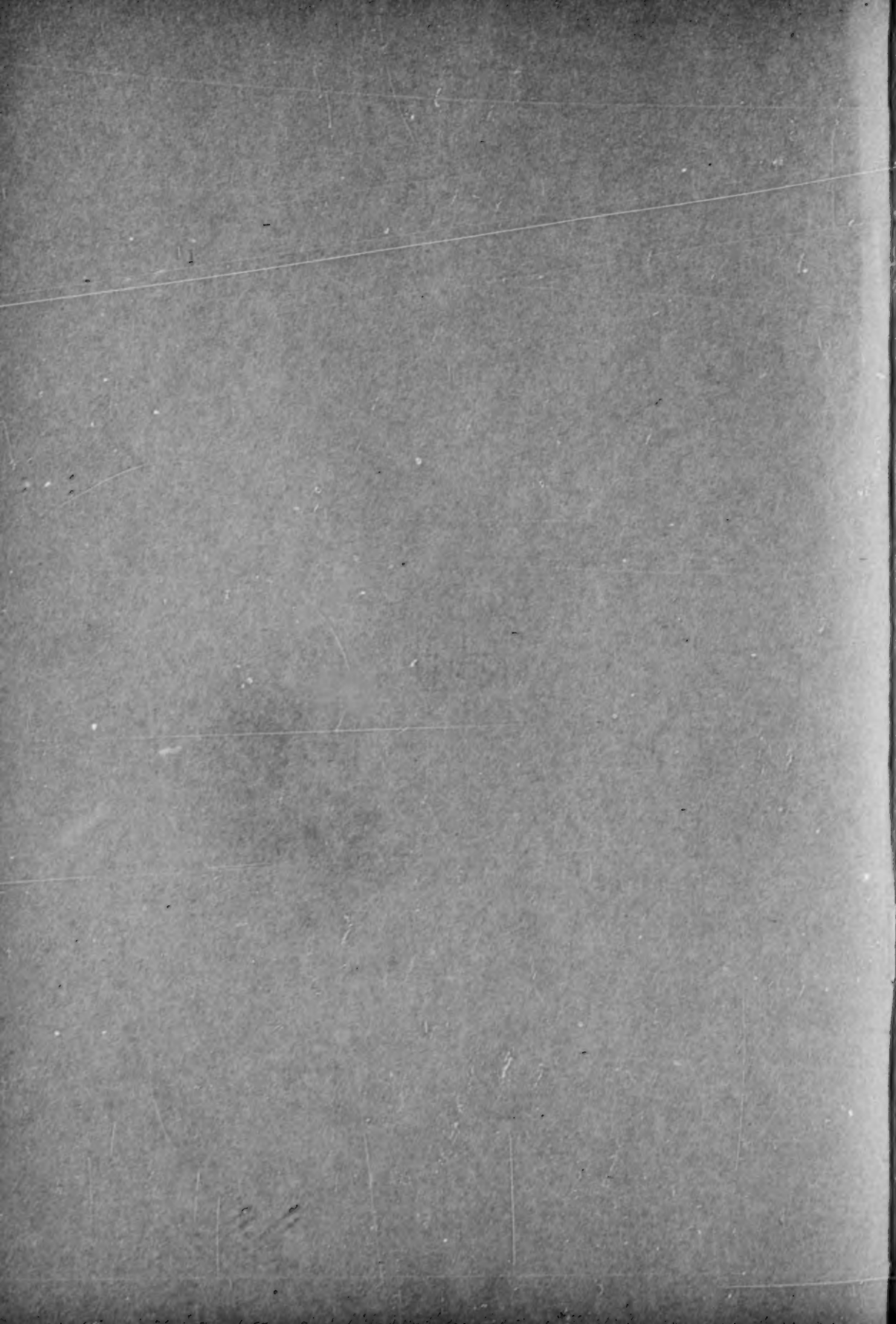
ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

SAUL H. KRENZEL, ESQUIRE
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SUPPLEMENTAL STATEMENT OF QUESTIONS

In light of the decision of the Supreme Court in *William "Sky" King v. St. Vincent's Hospital*, No. 90-889 (December 16, 1991), SEPTA supplements the questions presented.

1. Whether 38 U.S.C. Section 2024(d), the Veterans Re-employment Rights Act, implicitly requires that an employee/reservist provide timely notice of military leave to a civilian employer.

2. Whether an employee/reservist provided timely notice to his civilian employer when the reservist provided only seven days notice of an additional 1½ months of military leave, immediately following over 6½ months of leave, if the employee knew the precise dates of the additional military leave months prior to notifying the employer and the employee admits to concealing this information from the employer.

3. Whether an employee/reservist had provided timely notice of future military leaves to his civilian employer where the reservist/employee admitted that his motivation for concealing timely notification to his employer of the leaves was to "play poker" with his employer and, therefore, bring his work related problems to a head.

TABLE OF CONTENTS

	Page
Supplemental Statement of Questions	i
Table of Authorities	iii
Supplemental Statement of the Case	1
Reasons for Granting the Writ.	1
Argument	2
Conclusion	5

TABLE OF AUTHORITIES

<i>Cases:</i>	Page
<i>Blackmon v. Observer Transportation Co.</i> , 102 LC ¶11,451 (N.C. 1982).....	4
<i>Larsen v. Air California</i> , 313 F.Supp. 218 (C.D. Cal. 1970), <i>affirmed</i> , 459 F.2d 52 (9th Cir. 1971), <i>cert. denied</i> , 409 U.S. 895 (1972).....	3
<i>Lee v. The City of Pennsacola</i> , 639 F.2d 886 (5th Cir. 1986)	3, 4
<i>Monroe v. Standard Oil Co.</i> , 101 S. Ct. 2510 (1981).....	2
<i>Sawyer v. Swift & Co.</i> , 610 F. Supp. 38 (D. Kan. 1985) .	4
<i>William "Sky" King v. St. Vincent's Hospital</i> , No. 90-889, (Decided December 16, 1991).....	1
<i>Statutes:</i>	
38 U.S.C. §2024(d)	2
<i>Legislative History:</i>	
S. Rep. No. 1477, 90th Cong. 2d Sess. 2 (1968).....	3
H. Rep. No. 1303, 89th Cong. 2d Sess. 3 (1966)	3
House Hearings, 1968 at 7471	3
<i>Other Authorities:</i>	
Army Reserve Magazine, Spring 1985 p. 29	3

No. 91-802

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

KESTUTIS EIDUKONIS,

Respondent,

v.

SOUTHEASTERN PENNSYLVANIA
TRANSPORTATION AUTHORITY,

Petitioner,

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

SUPPLEMENTAL STATEMENT OF THE CASE

SEPTA incorporates its original statement of the case, particularly pages 8-13 of its original Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

SEPTA incorporates Section D of its original Petition for Writ of Certiorari, particularly pages 26-27.

SEPTA makes the following additional arguments in support of its Petition for Writ of Certiorari in light this Court's

decision in *William "Sky" King v. St. Vincent's Hospital*, No. 90-889. In *"Sky" King v. St. Vincent's Hospital*, the Court did not address whether there is an implicit requirement that notice of military leave be timely provided to the civilian employer. The only issue before the Court in *William "Sky" King v. St. Vincent's Hospital*, No. 90-889, was whether or not there was an implicit statutory restriction on the length of leave that an employer/reservist may take in order to maintain a right to civilian re-employment. The Court's holding that there was no limitation on a reservist's leave does not preclude this Court from addressing the question of whether 38 U.S.C. Section 2024(d) modifies the traditional employer/employee relationship such that reservists may take military leave from a civilian employer without providing timely notice of that leave to the employer, particularly in peace time and for a voluntary project. Moreover, in the Petition for Writ of Certiorari in *"Sky" King*, the Solicitor General specifically stated that notice was not an issue for the Court.

In addition, the Court in *"Sky" King* was not required to address whether it is permissible for a reservist to utilize military leave to deliberately avoid his employment responsibilities in order to retaliate for work related problems. In *"Sky" King*, the Court was not required to address a reservist's bad faith in concealing the scheduling of military leaves and taking frequent leaves to deliberately absent himself from the work place.

ARGUMENT

Section 2024(d) was not enacted by Congress with the intent that a reservist have unbridled control over an employer. In *Monroe v. Standard Oil Co.*, 101 S. Ct. 2510 (1981), a reservist contended that his employer was obligated to make work-schedule accommodations to a reservist because of military leaves. The reservist contended that, due to weekend drills and two weeks at summer camp, he lost income when he was not able to change shifts and that the employer was obligated to award him lost wages when an accommodation could not be made. The Supreme Court rejected this position and held that

Congress did not intend employers to provide special benefits to reservists not made available to other employees. *Id.* at 2517. The Supreme Court reviewed the legislative history and found that reservists were entitled to "the same treatment offered their co-workers not having such military obligations . . . but not preferential treatment". S. Rep. No. 1477, 90th Cong., 2d. Sess. 2 (1968); H.R. Rep. No. 1303, 89th Cong., 2d Sess. 3 (1966); 1968 House Hearings at 7471.

To permit the *Eidukonis* decision to stand would in essence permit preferential treatment. A reservist/employee would hold unbridled power over an employer based on his reserve obligations, an advantage not accorded to other employees. An employee could wait until the last moment to advise an employer of leaves, extend leaves without giving timely notice or simply take a leave to "punish" his employer. This could not have been the intent of Congress or the import of the holding in "*Sky*" King.

In cases under the predecessor to §2024(d), courts held that a reservist could not exercise unbridled control over his employer. In *Larsen v. Air California*, 313 F Supp. 218 (C.D. Cal. 1970), *affirmed*, 459 F.2d 52 (9th Cir. 1971), *cert. denied*, 409 U.S. 895 (1972), the court stated at page 220:

Section 459 (g)(4) [the predecessor to §2024(d)] can hardly be interpreted as entitling one to a life-time job. The scheme of the Federal re-employment rights statute does not require a court to disregard these aspects of the basic employment relationship which would make continued or renewed employment unreasonable.

See also Lee v. The City of Pennsacola, 634 F. 2d 886 (5th Cir. 1986) (Congress in amending the act did not intend to endow a reservist with unreasonable power over his employer).

Even the Army Reserves acknowledges that notice to the employer should be made as soon as the possibility of a leave exists (*See Army Reserve Magazine*, Spring 1985, p. 29 ("give the boss plenty of advance notice"). The article noted that most problems were caused by reservists making it difficult for their

"bosses". For example, school employees who could train in the summer but made it difficult by voluntarily training during the school year.

Section 2024(d) speaks in terms of a "request" for leave. Implicit in the word "request" is that an employer receive adequate notice to act in response to the request. Although 38 U.S.C. §2024(d) does not specifically state how much notice is required, in general, courts have built in the concept of timely notice. *See, e.g., Lee v. City of Pennsacola, supra; Sawyer v. Swift & Co.*, 610 F. Supp. 38 (D. Kan. 1985). Eidukonis knew of the extension of his leave as early as December 1984 and knew about his two week annual training in October 1984. Nevertheless, he deliberately waited months to advise his employer. Eidukonis attempts to hide behind the fact that the "actual orders" were not yet received. Eidukonis ignores the fact that he had orders for his two week training in November 1984 and the extension of his leave by 26 days was a foregone conclusion in December, 1984. Eidukonis' actions violate the implicit notice requirements of §2024(d). This Court should clarify the issue of notice to prevent hardships to employers and to provide guidance to lower courts who will be confronted with the issue. *See, e.g., Blackmon v. Observer Transportation Co.*, 102 LC ¶11,451 (N.C. 1982) (employee did not provide sufficient notice in advance).

Moreover, "Sky" King did not illustrate the type of conduct demonstrated by Eidukonis. Eidukonis' conduct exemplifies bad faith actions and questionable motivation towards his employer in that Eidukonis was using military leave to punish SEPTA for failing to promote him. Therefore, it is necessary to grant certiorari to affirm that reservists have an obligation to deal fairly with their civilian employers and that notice must be timely.